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## Silence at the Court: The Curious Absence of Regulatory Takings Cases from California Supreme Court Jurisprudence

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# SILENCE AT THE COURT: THE CURIOUS ABSENCE OF REGULATORY TAKINGS CASES FROM CALIFORNIA SUPREME COURT JURISPRUDENCE

*Michael M. Berger\**

What's a "regulatory takings case," and why should anyone care if the California Supreme Court entertains such things or ignores them?

Good question. Easy answer.

The "takings" part of the phrase comes from the constitutional command that private property not be taken for public use without just compensation.<sup>1</sup> The "regulatory" aspect merely signifies that the taking is alleged to have occurred through the impact of a governmental statute, ordinance or regulation, rather than through acquisition or direct physical use of private property. All types of takings require compensation.<sup>2</sup>

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\* J.D., 1967, Washington University School of Law; L.L.M., 1968, University of Southern California Law Center. The author is a shareholder in the Santa Monica law firm of Berger & Norton. He believes, as the late Justice Douglas did, that people with "axes to grind" should so note when they pontificate publicly, so their audience can know through what color spectacles their advisors view the issues being discussed. See William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228-30 (1965). To this end, the author notes the following. His practice is both procedurally and substantively specialized. Procedurally, he has been an appellate lawyer for most of the 26 years since he commenced life after law school. He is a former President of the California Academy of Appellate Lawyers and served a tour as Chairman of the State Bar's Committee on Appellate Courts. Substantively, his practice focuses on real property—more particularly, the issues raised by government actions (ranging from public works operations through land use and zoning to land acquisition) that implicate the just compensation commands of the state and federal constitutions. In that capacity, he represented the property owners in *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304 (1987), and *Preseault v. ICC*, 494 U.S. 1 (1990), and filed amicus curiae briefs in support of the property owners in numerous cases, including *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), and *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), which help define the substance of the law discussed in this Essay.

1. U.S. CONST. amend. V; CAL. CONST. art. I, § 19.

2. As Justice Brennan explained:

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.

The importance of "regulatory takings cases" lies in the context from which the cases arise. This category of cases is brought by the property owners rather than the government. It contains a variety of that type of litigation known as "inverse" condemnation.<sup>3</sup> Such cases have their genesis in a property owner's belief that some sort of governmental regulation has so adversely affected the ability to use property that the property has been taken in the constitutional sense.<sup>4</sup>

A list of the kinds of regulations that engender such feelings by property owners demonstrates the breadth of the potential impact of this litigation: endangered species;<sup>5</sup> wetlands;<sup>6</sup> historic preservation;<sup>7</sup> rent control;<sup>8</sup> a host of planning and zoning regulations dealing with such

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San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting). Justice Brennan's views in his dissenting opinion became the majority's rule in *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304 (1987) (holding that under Just Compensation Clause, land owner may recover damages when government has taken property by land-use regulation).

3. Eminent domain is the power of the sovereign to compel the sale of private property for public use. Condemnation is the usual term applied to a government lawsuit to compel acquisition. Inverse condemnation describes a suit brought by a property owner against the government when the owner believes that his or her property has been taken but no proceedings have been instituted by the government and no payment has been tendered. The just compensation guarantee is self-executing, thus permitting this type of suit. See *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Rose v. State*, 19 Cal. 2d 713, 720, 123 P.2d 505, 510 (1942).

4. Even former President Nixon has gotten into the act. Recently, a federal court held that the statute preventing Mr. Nixon from having greater access to his presidential papers than other citizens was a taking of Mr. Nixon's property for which he was owed compensation. *Nixon v. United States*, 978 F.2d 1269, 1270 (D.C. Cir. 1992).

5. See *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989); *Sierra Club v. Gilroy City Council*, 222 Cal. App. 3d 30, 271 Cal. Rptr. 393 (1990).

6. See *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990); *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990).

7. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

8. In fairness, the California Supreme Court has reviewed a number of rent control cases during this period. The issues, however, have generally focused on due process and equal protection claims rather than takings claims. See *Pennell v. City of San Jose*, 42 Cal. 3d 365, 721 P.2d 1111, 228 Cal. Rptr. 726 (1986) (holding that rent control ordinance which burdened some landlords by subsidizing low income tenants did not violate due process or equal protection), *aff'd*, 485 U.S. 1 (1988) (affirming California Supreme Court holding that takings claim was unripe); *Griffin Dev. Co. v. City of Oxnard*, 39 Cal. 3d 256, 703 P.2d 339, 217 Cal. Rptr. 1 (1985) (affirming constitutionality of ordinance regulating conversion of apartments to condominiums); *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984) (rejecting due process and equal protection challenges to city's rent control ordinance that imposed standard for measuring rate of return), *aff'd*, 475 U.S. 260 (1986); *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984) (rejecting due process and Thirteenth Amendment involuntary servitude challenges to city ordinance that prevented owner from demolishing apartments).

issues as density of population;<sup>9</sup> types of permissible land uses;<sup>10</sup> timing of development;<sup>11</sup> and the nearly limitless variety of conditions that can be devised by regulators affecting permissive use of property, such as easements for public passage,<sup>12</sup> dedications for public parks,<sup>13</sup> and exactions for public schools,<sup>14</sup> housing,<sup>15</sup> transportation,<sup>16</sup> or art.<sup>17</sup>

As indicated by the subjects listed, cases arising out of a regulatory takings claim usually generate a substantial amount of controversy. And emotion. And they often involve large amounts of money.

For example, in order to preserve the habitat of a rare rodent—or a butterfly nobody can remember having seen for a generation—a government agency tells the owners of thousands of acres of land that they cannot do anything on their land that will interfere with the indigenous habitat. Controversy is sure to erupt between property owners and nature protectors. One must only note the ongoing dispute between lumber companies (and their employees) and the protectors of the northern spotted owl.

Another example is provided by a United States Supreme Court case concerning a New York City landmark preservation law. While the case was being argued,<sup>18</sup> the oral argument inside was accompanied outside by a large crowd of picketers led by President Kennedy's widow. They were protesting the idea that the owners of Grand Central Terminal wanted the right to build an office tower over the historic structure—or to be paid if the City wanted to preserve the local ambience uncluttered by productive private use of privately owned property.

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9. *Dale v. City of Mountain View*, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976).

10. *Terminals Equip. Co. v. City & County of S.F.*, 221 Cal. App. 3d 234, 270 Cal. Rptr. 329 (1990); *Twain Harte Assocs. v. County of Tuolumne*, 217 Cal. App. 3d 71, 265 Cal. Rptr. 737 (1990).

11. *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal. App. 3d 1016, 282 Cal. Rptr. 877 (1991), *cert. denied*, 112 S. Ct. 3027 (1992); *Griffin Homes, Inc. v. Superior Court*, 229 Cal. App. 3d 991, 280 Cal. Rptr. 792 (1991) (depublished, 1992 Cal. LEXIS 519, 802 P.2d 1317, 4 Cal. Rptr. 2d 170 (Jan. 29, 1992)); *Gilbert v. State*, 218 Cal. App. 3d 234, 266 Cal. Rptr. 891 (1990).

12. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

13. CAL. GOV'T CODE § 66477 (West Supp. 1993).

14. *See, e.g., Garrick Dev. Co. v. Hayward Unified Sch. Dist.*, 3 Cal. App. 4th 320, 4 Cal. Rptr. 2d 897 (1992); *Shappell Indus. v. Governing Bd.*, 1 Cal. App. 4th 218, 1 Cal. Rptr. 2d 818 (1991).

15. *See Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

16. *See Russ Bldg. Partnership v. City & County of S.F.*, 199 Cal. App. 3d 1496, 246 Cal. Rptr. 21 (1987).

17. *See Paul J. Silvern, Negotiating the Public Interest: California's Development Agreement Statute*, LAND USE L. & ZONING DIG., Oct. 1985, at 3.

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

For past generations, murky areas of the country were referred to as "swamps." It was considered a good thing to fill those swamps so that pests and health hazards could be eliminated, and the resulting dry land could be put to beneficial use. More recently, however, it has been decided that these areas need to be preserved. They have metamorphosed from "swamps" into "wetlands," and their protectors have become legion.<sup>19</sup> Property owners who discover that they own land which is partly or entirely a "wetland," find themselves precluded from using their land and feel compelled to sue the regulators for compensation. When they do so, they are generally reviled as environmental despoilers—though usually not in such gentle terms.

These cases also call into play some of the more selfish emotions in human beings. They appear so regularly that the literature is filled with references to the NIMBY—not in my back yard—and drawbridge—I'm on board, so let's raise the drawbridge—syndromes. People suffering from NIMBYism do not want "undesirable" land uses nearby. And "undesirable" runs the gamut from toxic industrial sites to housing tracts viewed as being too dense, or too affordable, or simply blocking the view.

Drawbridgers are often caricatured as environmentalists who already own their home in the hills. They relentlessly pressure legislative bodies for protective legislation. Not being fools, legislators who must repeatedly stand for reelection have recognized that these days there are usually more people on the stop growth side than on the encourage growth side. This is true in spite of the poor state of the economy. Politicians read the polls, and they know where the votes lie.<sup>20</sup>

Whatever the underlying reason, regulatory takings cases thus pit property owners who want to make economically productive use of land against regulators who have decided that their land must remain un- or under-utilized. The legal issue is whether such prohibition can make the property owner bear the cost of providing some public benefit—such as preservation of owls, rodents, wetlands or uncluttered hillsides—or

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19. The wetlands cases really get sticky when the land, as viewed on the surface by ordinary mortals, is not "wet" at all. Honest. The manner in which these regulations are drawn make wetlands far more numerous than swamps ever were. Wetlands are defined by the type of vegetation growing on them, the proximity of the underground water table to the surface (not visible from the surface), and the duration of the closeness of the water table and the surface. Using this loose definition, your backyard probably qualifies as a wetland. See Virginia S. Albrecht, *The Wetlands Debate*, URB. LAND, May 1992, at 20, 20-21 ("[A]n area can be deemed a wetland if the water table rises to within 18 inches of the surface.").

20. See Michael M. Berger & Gideon Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685, 700-02 (1986).

whether government will have to buy the land to accomplish its regulatory goals.

Nearly three-quarters of a century ago, Justice Holmes characterized the legal task as deciding whether the regulation goes "too far."<sup>21</sup> Although some efforts have been made, courts have not been able to improve on that amorphous phraseology. Thus, the United States Supreme Court has concluded that each case must be decided ad hoc, on its own facts, and the Court repeatedly analyzes regulatory takings cases by returning to the first year property law professors' "bundle of sticks" analogy.<sup>22</sup>

As should be obvious, something in the broad range of regulations under discussion affects everyone sooner or later. How the law accommodates these interests is significant. And, with the United States Supreme Court doing its constitutional analysis by examining sticks and twigs from the property rights bundle on an "ad hoc" basis, it would also appear necessary to have some local judicial benchmarks along the way (a bit more substantial than Hansel and Gretel's famous breadcrumbs) so that all participants in the land-use planning process might have a clue as to the location of the constitutional line.

If you have been reading the footnotes along with this text—or even if you only glanced briefly at the bottom of the page—you may have noticed one interesting thing about the preceding group of case citations: almost none came from the California Supreme Court. Is that because California cases lack interesting issues? I don't think so. Call me parochial, but I'll stack the interest in those issues—and the number of people potentially affected by them—against some of the issues the California Supreme Court *has* been deciding during that same time frame.<sup>23</sup>

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

22. See Michael M. Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39, 46-49 (1985).

23. See, e.g., *Southwest Concrete Prods. v. Gosh Const. Corp.*, 51 Cal. 3d 701, 798 P.2d 1247, 274 Cal. Rptr. 404 (1990) (holding that late charge on contract sale is not interest on loan of money); *Estate of MacDonald*, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990) (determining meaning of "express" declaration needed to waive community property rights); *Hutnick v. United States Fidelity & Guar. Co.*, 47 Cal. 3d 456, 763 P.2d 1326, 253 Cal. Rptr. 236 (1988) (determining statute of limitations for action on mechanic's lien release); *Shamblin v. Brattain*, 44 Cal. 3d 474, 749 P.2d 339, 243 Cal. Rptr. 902 (1988) (determining showing needed to set aside default judgment); *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 707 P.2d 195, 219 Cal. Rptr. 133 (1985) (holding that "ladies day" at car wash violated Unruh Civil Rights Act); *Gutierrez v. Mofid*, 39 Cal. 3d 892, 705 P.2d 886, 218 Cal. Rptr. 313 (1985) (determining when statute of limitations for medical malpractice begins to run); *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa*, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985) (holding that fortunetelling is speech protected by First Amendment); *T.M. Cobb Co. v. Superior Court*, 36 Cal. 3d 273, 682 P.2d 338, 204 Cal. Rptr. 143 (1984) (holding that

Has it been because of a lack of litigation in California? That doesn't ring true either. Judging by the published opinions of the courts of appeal, the California judiciary has been quite active.<sup>24</sup> In fact, the field of takings law has been something of a hotbed of litigation nationally for the last decade and a half; California has not been isolated from this trend.<sup>25</sup>

Has it been because the issues presented in the California cases haven't seemed—for want of a better term—"review-worthy"? Aside from the general interest and importance of takings law, the United States Supreme Court appears to have plucked seven California regulatory takings cases from the bushels of certiorari petitions during that period. Only one of the seven had received review by the California Supreme Court on the regulatory takings issue.<sup>26</sup> Even with the need to plow through petitions from all over the country, arising in state, federal, territorial and military courts, the United States Supreme Court managed to find that a substantial group of decisions by the California Courts of Appeal contained issues, arguments or subject matters that merited further examination.<sup>27</sup>

Has it been because the law developed by the California judiciary has been so clear, straightforward and in harmony with the rest of the country that there has been no reason for the state supreme court to

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California Code of Civil Procedure § 998 offer can be revoked); *Becker v. S.P.V. Constr. Co.*, 27 Cal. 3d 489, 612 P.2d 915, 165 Cal. Rptr. 825 (1980) (determining extent of judgment enterable on default).

This list is not intended to be exhaustive. Neither is the placement of any case in it intended to denigrate the case or offend anyone. Each of these cases was undoubtedly important to its parties. It is even possible that the decision reviewed by the California Supreme Court in some of these cases had been incorrect in the lower court. As the justices repeatedly remind us, however, neither of these is the standard for review. Given the widespread impact of some of the land-use/regulatory takings cases, including even one such case in the agenda might have done at least as much good for California as another decision on default judgments or statutes of limitation. And, with all respect, the number of people adversely affected is probably greater than the number of those whose interests are impacted by either "ladies day" or "fortunetelling."

24. Gerald F. Uelman, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier Than the Pencil?* 26 LOY. L.A. L. REV. 1007, 1007-08 (1993).

25. See, e.g., cases cited *supra* notes 5-12, 14-16.

26. See *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). One of the rent control cases also received review by both the United States and California Supreme Courts; however, the California decision did not address the takings issue. *Pennell v. City of San Jose*, 42 Cal. 3d 365, 721 P.2d 1111, 228 Cal. Rptr. 726 (1986), *aff'd*, 485 U.S. 1 (1988).

27. See *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

involve itself? Although some—including this commentator—would demur, that thought was at least possible before 1987. In mid-1987, however, the United States Supreme Court told the California judiciary—in two different cases—that its decisions in this field were out of line with the requirements of the United States Constitution and at serious odds with the law applied in our sister states. Although some Californians might not have agreed with them, these United States Supreme Court comments are hard to ignore: “[T]he California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment,”<sup>28</sup> and “our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts.”<sup>29</sup>

The California Supreme Court has managed to ignore the United States Supreme Court. Since 1987 the California Supreme Court has not granted review in a single regulatory takings case. Indeed, aside from the rent control cases noted earlier, in the last decade and a half only one regulatory takings case has received plenary consideration by the California Supreme Court.<sup>30</sup> Further, that case was decided so long ago, in 1979, that only one justice that decided the case remains on the court today.

Let that sink in for a moment. We live in an era when other state supreme courts are deciding numerous regulatory takings cases,<sup>31</sup> the United States Supreme Court is hearing them on a regular basis,<sup>32</sup> and

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28. *First English*, 482 U.S. at 311.

29. *Nollan*, 483 U.S. at 839-40 (citing numerous cases from throughout United States and amicus curiae brief of National Association of Home Builders, which was written by author of this Essay).

30. *Agins*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372.

31. See, e.g., *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); *Lamar Advertising v. City of Albany*, 389 S.E.2d 216 (Ga. 1990); *Ailes v. Decatur County Area Planning Comm'n*, 448 N.E.2d 1057 (Ind. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Kempf v. Iowa City*, 402 N.W.2d 393 (Iowa 1987); *Kasperek v. Johnson County Bd.*, 288 N.W.2d 511 (Iowa 1980); *Maryland Port Admin. v. QC Corp.*, 529 A.2d 829 (Md. 1987); *Electro-Tech, Inc. v. H.F. Campbell Co.*, 445 N.W.2d 61 (Mich. 1989), *cert. denied*, 493 U.S. 1021 (1990); *Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976); *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12 (N.H. 1981), *partially overruled by Auburn v. McEvoy*, 553 A.2d 317 (N.H. 1988); *Seawall Assoc. v. City of N.Y.*, 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989); *Pennsylvania N.W. Distribs., Inc. v. Zoning Hearing Bd.*, 584 A.2d 1372 (Pa. 1991); *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash.), *cert. denied*, 111 S. Ct. 284 (1990); *Allingham v. Seattle*, 749 P.2d 160 (Wash. 1988); *Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988).

32. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Yee*, 112 S. Ct. 1522; *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Nollan*, 483 U.S. 825; *First English*, 482 U.S. 304; *Hodel v. Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *MacDonald, Sommer & Frates*, 477 U.S. 340; *United States*



the lower California courts are maintaining a steady diet of them. Yet, the last plenary review by the California Supreme Court was so long ago that almost the entire membership of the California Supreme Court has been transformed in the interim.

What are Californians supposed to think? Where do they turn for a definitive statement of their state's law? Since 1987, when the United States Supreme Court wiped California's jurisprudential slate clean of holdings that were said to have misinterpreted the protection required by the Fifth Amendment's Just Compensation Clause and to have been out of step with the interpretations of all other states, one might have expected the California Supreme Court to fill that void and provide some guidance since that time. Indeed, given the United State Supreme Court's clear, double-barrelled message, intended to bring California's decisions into harmony with the federal constitutional minimum, it would have been appropriate for the California Supreme Court to quickly provide guidance to the lower courts on how to apply the new constitutionally required rules.

Actually, the United States Supreme Court's characterization of pre-1987 California law as being "inconsistent" was rather tame. For years, respected commentators—including those who represented governmental regulators or sympathized with them—stumbled over each other in an effort to find the right pejorative term to describe the California situation. Their efforts put the California judiciary's holdings through a gauntlet of invective ranging from "restrictive and extreme"<sup>33</sup> to "onerous" and "draconian"<sup>34</sup> to "parroting constitutionally required" language but devising a "rule in no-win language"<sup>35</sup> to "bizarre"<sup>36</sup> to creating such an anti-developer atmosphere that, rather than suing a municipality to obtain relief, "it would cost a lot less and save much time if [the developer] simply slit his throat."<sup>37</sup>

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v. *Riverside Bayview Homes*, 474 U.S. 121 (1985); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *San Diego Gas & Elec. Co.*, 450 U.S. 621; *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

33. Benjamin A. Kudo, Nukolii: *Private Development Rights and the Public Interest*, 16 URB. L. 279, 287 (1984).

34. David L. Callies, *The Taking Issue Revisited*, LAND USE L. & ZONING DIG., July 1985, at 6, 6-7.

35. George A. Staples, Jr., *Exaction—Mandatory Dedications and Payments in Lieu of Dedication*, 1980 INST. ON PLAN. ZONING & EMINENT DOMAIN 111, 119.

36. RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* 257 (1985).

37. *Id.* at 293.

Thus, after being twice chastised in 1987, some corrective response—or, at least, acknowledgement—would have seemed appropriate. But that was not to be. No review has since been granted.

The California Supreme Court's decisional jurisprudence is thus all pre-1987—actually, pre-1980—and unrelated to the more recent decisions of the United States Supreme Court.<sup>38</sup> Those older decisions give neither lower courts nor litigants any inkling as to the California Supreme Court's response to the United States Supreme Court's rulings on issues of paramount federal constitutional law or any clue as to the Court's views on how California's earlier appellate opinions have been affected by *First English Evangelical Lutheran Church v. County of Los Angeles*, *Nollan v. California Coastal Commission*, and their progeny.<sup>39</sup>

The result in the lower courts is predictable: confusion,<sup>40</sup> anarchy,<sup>41</sup> chaos and conflicting decisions.<sup>42</sup>

38. One northern California trial court put the issue bluntly:

The United States Supreme Court has made some rather startling pronouncement[s] in this field of law that *may* cause *our* courts to rethink that [compensation is not a constitutionally available remedy for property owners denied use of their land] . . . [W]e should be reminded *a trial court is to enforce the law of the State of California*

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*Gilbert v. State*, No. 636481-0, slip op. at 4 (Alameda Sup. Ct. June 28, 1988), *aff'd*, 218 Cal. App. 3d 234, 266 Cal. Rptr. 891 (1990) (emphasis added).

Frankly, such jurisdictional blather has not been seen in print since the famous "states' rights" declaration by the trial judge in *Estes v. Texas*, 381 U.S. 532 (1965). Compare it yourself. The declaration is quoted in Chief Justice Warren's concurring opinion. *Id.* at 566 (Warren, J., concurring). One had hoped we were beyond such embarrassing, antebellum judicial parochialism.

39. This is no mere theoretical problem. In *Gilbert v. State*, 218 Cal. App. 3d 234, 253, 266 Cal. Rptr. 891, 902-03 (1990), the court of appeal agreed to consider federal cases in its decision because the court found federal precedent "persuasive" on the takings issue. *Id.* at 253-54, 266 Cal. Rptr. at 903. Please note that these cases—decided by the United States Supreme Court as a matter of paramount federal law—were not viewed as binding, but merely persuasive, as though the California courts had discretion to disregard them.

40. See *Twain Harte Assocs. v. County of Tuolumne*, 217 Cal. App. 3d 71, 83-84, 265 Cal. Rptr. 737, 742-43 (1990) ("'Bright line' precedent is not the prevailing jurisprudential norm in this area of the law.").

41. In a case denied review in 1989, the trial court had this to say about the impact of United States Supreme Court decisions: "[Y]ou're going to have to get . . . this state to accept the law of the United States Supreme Court. Nobody told me yet it has done [so]." *Gilbert*, No. 636481-0, at 18.

42. Compare *Surfside Colony, Ltd. v. California Coastal Comm'n*, 226 Cal. App. 3d 1260, 277 Cal. Rptr. 371 (1991) (requiring site-specific evidence of burden created by landowner's use and placing burden of proof on government) with *Whalers' Village Club v. California Coastal Comm'n*, 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985) (upholding dedication of easement based on non site-specific evidence of burden on public created by landowner's use), *cert. denied*, 476 U.S. 111 (1986) and *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal. App. 3d 1016, 282 Cal. Rptr. 877 (placing burden of proof on landowner), *review denied*, 1991 Cal. LEXIS 4556 (Sept. 26, 1991), *cert. denied*, 112 S. Ct. 3027 (1992); compare *Twain*

“So what?” you might ask. “Doesn’t the just compensation guarantee appear in both state and federal constitutions so that you can get an apt application of the concept by simply suing in federal court?” This is a rational (albeit digressive) response, but one that has been eliminated in these circumstances. In 1985 the United States Supreme Court decreed that regulatory takings cases *must* be brought in state—rather than federal—courts.<sup>43</sup> Federal court litigation is not ripe until a property owner has sought compensation through state procedures.<sup>44</sup> As a consequence, increasing numbers of these cases are being brought in the California courts. The financial stakes are often high. The kinds of issues governments are now raising and the groups that regularly pressure them for action (such as further expansion of the ever-growing lists of threatened and endangered species supposedly requiring protection including, most recently, a cockroach)<sup>45</sup> are rapidly increasing and in need of attention. Thus the California Supreme Court’s guidance on what the California

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*Harte*, 217 Cal. App. 3d 71, 265 Cal. Rptr. 737 (holding that “open-space” zoning was taking) with *Pinheiro v. County of Marin*, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1976) (holding that “open-space” zoning was not taking); compare *Gilbert*, 218 Cal. App. 3d 234, 266 Cal. Rptr. 891 (holding that water moratorium which effectively deprived landowner of economic use of property was not compensable taking) with *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (holding that refusal to hook up water resulted in compensable taking where landowner was deprived of economic use of property); compare *Rosco Holdings, Inc. v. State*, 212 Cal. App. 3d 642, 260 Cal. Rptr. 736 (1989) (requiring owner to challenge validity of government action before filing action for compensation), *cert. denied*, 494 U.S. 1080 (1990) with *Preseault v. ICC*, 494 U.S. 1 (1990) (requiring landowner to sue for compensation under Tucker Act before challenging validity of government action); compare *First English Evangelical Lutheran Church v. County of L.A.*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (denying compensation to landowner prohibited from rebuilding in flood zone enacted for public health and safety), *review denied*, 1989 Cal. LEXIS 4224 (Aug. 25, 1989), *cert. denied*, 439 U.S. 1056 (1990) with *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991) (noting that taking may be compensable even if flood zone ordinance based on public health and safety reasons); compare *Guinnane v. San Francisco City Planning Comm’n*, 209 Cal. App. 3d 732, 257 Cal. Rptr. 742 (holding that moratorium was not taking), *review denied*, 1989 Cal. LEXIS 3657 (June 7, 1989), *cert. denied*, 493 U.S. 936 (1989) with *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990) (holding that moratorium was taking), *cert. denied*, 111 S. Ct. 1404 (1991).

43. *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). Although it is theoretically possible to request that a federal court exercise its discretionary supplemental jurisdiction over a state law inverse condemnation claim if the state law claim is attached to a valid federal law claim, see *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), busy federal trial judges are generally not eager to try cases they don’t have to.

44. See generally Michael M. Berger, *The “Ripeness” Mess in Federal Land Use Cases, or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, 1991 INST. ON PLAN. ZONING & EMINENT DOMAIN 7-1 (discussing federal rule requiring state remedies for regulatory taking to be exhausted before federal suit becomes ripe).

45. See Maura Dolan, *Endangered Species Act Battles for Its Own Survival*, L.A. TIMES, Dec. 21, 1992, at A1.

rules are *now* is indispensable for all participants in land-use planning and regulation. As noted earlier, given the range of issues involved in these cases, the number of people affected is quite substantial.

Yet, the California Supreme Court remains silent and aloof. Without clear guidance from the state's supreme court, confusion, unfairness and anarchy will continue. That harms all and benefits none. It breeds unpredictable litigation results, undermining confidence in the judicial system.

The warning is oft-repeated that one who asks the gods for intervention plays a dangerous game and may be cursed by having a wish granted. Whether one unleashes a demon, a genie or a court of last resort, the results are generally unpredictable.

Nonetheless, we are Californians. Our jurisprudence is shaped by a legal system led by the California Supreme Court. One primary reason for having a "supreme" court is that there is only one such entity. Lower courts can differ, but the ultimate decision-making responsibility lies with the supreme court. Regardless of one's political or philosophical leanings or desires, neither trial nor appellate judges are fungible. Given the number of these judges in California, it is not surprising that they regularly express different views about the same issue.

Someone needs to lay down the law. Like it or not, that someone is the California Supreme Court. As long as the California Supreme Court leaves lower courts with the impression that their decisions will not be reviewed, each court of appeal will be free to decide cases according to its view of the law. And as long as the California Supreme Court remains silent, litigants will feel that all issues remain open. After all, the current supreme court has not grappled with any of them.

Why the reticence? That is a question that can only be answered by others. If I had a vote, however, I'd say it's time to end the drought. The United States Supreme Court has repeatedly spoken on the takings issue. If the teachings of those decisions are to be incorporated into California law, it will only be at the tutelage of the California Supreme Court. Too many refuse to accept anything less as being final.

