Golden Gate University Law Review

Volume 17 | Issue 2 Article 2

January 1987

Eminent Domain by Regulation: Developing a Unified Field Theory for the Regulatory Taking

Barbara J. Savery

COMMENT

EMINENT DOMAIN BY REGULATION: DEVELOPING A UNIFIED FIELD THEORY FOR THE REGULATORY TAKING*

Government can impact private property in two ways. It can regulate its use through an exercise of the police power in the interest of health, safety and general welfare,[1] or it can appropriate property for public use through eminent domain proceedings.[2] Eminent domain involves a taking of property for public use.[3] The police power involves the regulation of property to prevent its use in a manner detrimental to the public interest.[4] The traditional distinction between the scope of the two powers is reflected in the remedies for their abuse:[5] an eminent domain taking requires the payment of just compensation under the Fifth Amendment,[6] while regulation under the police power is

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* Two major Supreme Court decisions, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S.L.W. 4781 (U.S. June 9, 1987) and Nollan v. California Coastal Commission, 55 U.S.L.W. 5145 (U.S. June 23, 1987), were issued while this Comment was in the final stages of publication. For a discussion of their impact on the law of regulatory takings, *see infra* End Note.

1. Mugler v. Kansas, 123 U.S. 623, 669 (1893); 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN, §1.42 (J. Sackman rev. 3d ed. 1985) [hereinafter cited as "NICHOLS"].

2. 1 NICHOLS, *supra* note 1, §1.11. According to Nichols, the elements which comprise the power of eminent domain are a) the power to take b) without the owner's consent c) for the public use.

3. 1 NICHOLS, *supra* note 1, §1.11.

4. *Id.*

5. Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 REAL EST. L.J. 211, 212 (1984).

6. The fifth amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. The fifth amendment applies to the states through the fourteenth amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980); Chicago, B.&Q.R. Co. v. Chicago, 166 U.S. 226, 239, 241 (1897).

tested by a Fourteenth Amendment due process standard and is subject to invalidation.[7]

The distinction between the two powers has broken down. Limited in pre-Colonial times to the condemnation of private land for roads,[8] the power of eminent domain is now used to enhance community aesthetics.[9] In *Berman v. Parker*,[10] the United States Supreme Court sustained the condemnation of a well-maintained store in a generally blighted area as part of a redevelopment program. Since his store needed no rehabilitation, and there was therefore no legitimate public purpose for condemning it, the owner charged that it should not be included in the redevelopment program. The Court upheld the eminent domain proceeding on the grounds that the development of a more attractive community justified taking the plaintiff's property,[11] and that public use encompassed spiritual as well as physical considerations.[12]

The notion of what constitutes a legitimate public interest subject to police power regulation has also expanded.[13] Initially used to impose height limitations[14] and to segregate uses,[15] police power regulations are now used for many of the same purposes as eminent domain, including the resolution of aesthetic problems. Billboard[16] and open space[17] regulations are a familiar

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7. The fourteenth amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty or property without due process of law . . . ." U.S. Const. amend. XIV, §1, cl. 2.

8. Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 697 (1985).

9. Berman v. Parker, 348 U.S. 26, 33 (1954).

10. 348 U.S. 26 (1954).

11. *Id.* at 31.

12. *Id.* at 33.

13. *See* Agins v. Tiburon, 447 U.S. 255 (1980) (maintenance of open space); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (preservation of historical landmark); Village of Belle Terre v. Borras, 416 U.S. 1 (1973) (preservation of family values); Mugler v. Kansas, 123 U.S. 623 (1893) (restraint on the production of alcoholic beverages).

14. Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1932).

15. Euclid v. Ambler, 272 U.S. 365 (1926).

16. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd* 453 U.S. 490 (1980). Justice Tobriner, upholding summary judgment against a plaintiff who attacked an ordinance restricting the placement of billboards, warned against succumbing to a bleak materialism and concluded with an Ogden Nash ditty:

> I think that I shall never see
> A billboard lovely as a tree.

result. In *Arastra Limited Partnership v. City of Palo Alto*,[18] Palo Alto committed itself to the acquisition of open space around an existing city park. Originally intending to purchase the land, the City ran into financial problems and placed the targeted property into an open space zone. The California Court of Appeals found that the zoning ordinance was invalid because it plainly intended to achieve eminent domain results.[19] The due process standard is flexible.[20] Therefore, social and judicial acceptance of expanded regulatory objectives[21] frequently immunizes them from constitutional attack. In general, a regulation need only advance a legitimate state interest and be rationally related to that interest in order to survive substantive due process attack.[22]

The blurring of the lines between what constitutes public use for eminent domain and what is considered a proper public welfare objective of the police power[23] means that government purpose can no longer be used to distinguish between the two powers. They have become functionally interchangeable.[24] The Supreme Court's recognition that the two powers are coterminus[25] demands that they be treated not as separate entities, but as "two points on a continuum which is the power of govern-

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Indeed, unless the billboards fall,
I'll never see a tree at all.

Id. at 886, 610 P.2d at 429, 164 Cal. Rptr. at 532.

17. Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976); Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), *vacated* 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979).

18. 401 F. Supp. 962 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1126 (N.D. Cal. 1976).

19. *Arastra*, 401 F. Supp. at 975.

20. Euclid v. Ambler, 272 U.S. 365, 387 (1926). *Euclid* foresaw today's expansion of the police power in admitting that "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." *Id.* at 387.

21. Berman v. Parker, 348 U.S. 26, 33 (1954).

22. *Euclid*, 272 U.S. at 395; Nectow v. Cambridge, 277 U.S. 183, 187-88 (1928).

23. Costonis, *'Fair' Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1036 (1975).

24. *Id.*

25. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984). Seven members of the Court joined in the *Midkiff* opinion; Justice Rehnquist dissented, and Justice Marshall did not take part in the proceedings. The Court repeated its characterization of the "two" powers in Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984).

ment".[26] The tension between the traditional "correlative view",[27] which sees the two powers as "very different",[28] and the more recent approach, which openly admits that they are interchangeable,[29] has produced what one writer characterized as "doctrinal schizophrenia".[30] That schizophrenia, coupled with the eagerness of some state and local governments to use the police power as a less expensive alternative to eminent domain,[31] has, in turn, produced a judicial crisis: if government has exercised the police power for a condemnatory purpose, i.e., to extract a public use, then Fifth Amendment compensatory, not Fourteenth Amendment equitable, remedies are appropriate.

As early as 1871, some courts recognized that a taking could occur without formal condemnation.[32] Judicial recognition of the regulatory taking is now widespread,[33] but courts remain reluctant to find compensable takings.[34] Many are inclined to treat alleged regulatory takings as an improper exercise of the police power,[35] ignoring their condemnatory overtones. Such courts

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26. Berger and Kanner, *Thoughts on the 'White River Junction Manifesto': A Reply to the 'Gang of Five's' Views on Just Compensation for Regulatory Takings of Property*, 19 LOY. L. REV. 685, 724 (1986). *See also* Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15, 33 (1983). Bauman feels that there is "a consistent constitutional scheme . . . in which regulating and taking are merely polar ends of the entire spectrum of governmental power."

27. Costonis, *supra* note 23, at 1035.

28. Mugler v. Kansas, 123 U.S. 623, 669 (1893).

29. *Midkiff*, 467 U.S. at 240: "The 'public use' requirement is thus coterminus with the scope of a sovereign's police powers." *Accord* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984).

30. Costonis, *supra* note 23, at 1047.

31. *See* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976). The City of Palo Alto received information on the use of zoning as an alternative to eminent domain in public hearings. *Id.* at 974.

32. Pumpelly v. Green Bay Company, 80 U.S. (13 Wall.) 166, 179 (1871).

33. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986); Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985); Ruckelshaus v. Monsanto Co., 476 U.S. 986 (1984); Agins v. City of Tiburon, 447 U.S. 255 (1980); PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); United States v. Eureka Mining Co., 357 U.S. 155 (1958); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *MacDonald, Williamson, Agins* and *Penn Central* apply the principle to land use regulations.

34. Although the United States Supreme Court acknowledged the theoretical existence of a regulatory taking in 1922 in *Pennsylvania Coal*, 260 U.S. 393, the Court has never found a compensable taking. *See supra* note 33.

35. Mugler v. Kansas, 123 U.S. 623 (1893); Agins v. Tiburon, 24 Cal. 3d 266, 598

have been willing to excuse regulations which in effect "took" seventy-five percent,[36] eighty-seven percent[37] and even arguably one hundred percent[38] of the underlying property value. Other courts treat police power takings as hybrids, viewing them as excessive but legitimate regulations which become, at some undefined point, condemnatory.[39] Still others avoid dealing with the taking issue by finding taking claims premature because administrative remedies have not been exhausted,[40] or by abstaining.[41] Those courts which are willing to find compensable takings[42] seldom agree on compensation,[43] acknowledging that eminent do-

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P.2d 25, 157 Cal. Rptr. 372 (1979); Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976).

36. Euclid v. Ambler, 272 U.S. 365, 384 (1926).

37. Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915).

38. Just v. Marinette, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972). The *Just* court found that a county shorelands ordinance did not depreciate the value of the plaintiff's land because it was in its natural state. It held that depreciation could not be based on possible uses, but on the existing condition of the property, and that value based on changing the character of the land was not an essential or controlling factor in evaluating a taking claim. *Id.* at 23, 201 N.W.2d 771.

39. The Supreme Court articulated the classic view of the so-called continuum approach to regulatory takings in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922): "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Although the California Supreme Court tried to distinguish Justice Holmes' comments as an indication of the point at which due process was violated, most courts have interpreted them as indicating that, at some point, a regulation becomes an exercise of eminent domain. *See* cases cited *supra* note 33.

40. *See* MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986); Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985); and Agins v. City of Tiburon, 447 U.S. 255 (1980). *See also* Prince George's County v. Blumberg, 288 Md. 275, 418 A.2d 1155 (1980). Although the owner was entangled in a multi-agency administrative maze, the court held that the burden of exhausting each agency's individual remedies did not excuse the owner's failure to do so. *Id.* at 292-94, 418 A.2d 1165.

41. For a discussion of the alleged abuse of the abstention doctrine in the Ninth Circuit Court of Appeals, *see* Berger and Kanner, *supra* note 26, at 694-95.

42. *See, e.g.*, Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983); Sheerr v. Evesham Township, 184 N.J. Super. 11, 445 A.2d 46 (1982); Ventures in Property Inv. v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978); Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), *vacated* 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979); Keystone Associates v. Moerdler, 19 N.Y. 2d 78, 278 N.Y.S.2d 185, 224 N.E.2d 700 (1966).

43. *Contrast* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962, 982 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976) (city ordered to pay the fair market value of fee title, not easement value), and Sixth Camden v. Evesham Township, 420 F. Supp. 709, 729, (D.N.J. 1976) (temporary damages awarded on the basis of the fair rental value of the property).

main standards for just compensation do not easily apply to regulatory takings.[44]

The search for regulatory taking standards has been compared to the physicist's hunt for the quark.[45] Because of the clear constitutional mandate that just compensation be paid when land is taken for public use,[46] it is critical that the courts promulgate clear regulatory taking standards and establish uniform criteria for valuing the compensation due. Development of a unified field theory for takings is imperative: nothing less than the Constitution demands that we find the quark.

I. THERE IS NO CLEAR STANDARD FOR THE REGULATORY TAKING

James Madison, who wrote the Fifth Amendment, intended the clause to apply only to direct physical takings of property by the federal government.[47] As a result, the courts are still struggling to apply the physical taking criteria of eminent domain to regulatory takings.[48] Most courts are willing to concede a regulatory taking when physical invasion is involved,[49] but beyond this, there is little agreement regarding taking criteria.

The definition of regulatory taking standards involves four primary problems, the first being the sheer variety of regulatory

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44. *See, e.g.*, Zinn v. State, 112 Wis. 2d 417, 438, 334 N.W.2d 67, 77 (1983) (Abrahamson, J., concurring), where Justice Abrahamson ruefully admitted that, despite the majority's willingness to find a regulatory taking, the plaintiff would have a hard time establishing damages since the court was forced, essentially, to value a cloud on title.

45. C. HAAR, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND, 766 (3d ed. 1976).

46. *See supra* note 7. *See also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (the payment of just compensation is not precatory).

47. Note, *supra* note 8, at 711.

48. *Compare* United States v. Causby, 328 U.S. 256 (1945) and Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976). *Causby* found that defendant's overflights effected a physical invasion of plaintiff's airspace, while *Fred F. French* found no physical invasion even though plaintiff's private parks were opened to the public by zoning regulations. Physical invasion often plays a sub rosa role in court decisions such as Kaiser Aetna v. United States, 444 U.S. 164 (1979), in which the Army Corps of Engineers was not allowed to force a developer to open a private lagoon to the public, even though the lagoon was connected to navigable waters and under the Corps' jurisdiction.

49. *See Causby*, 328 U.S. 256.

acts.[50] A second problem arises from the fact that, while regulation can have the same impact as an exercise of eminent domain,[51] eminent domain taking standards are not directly applicable. The confusion in judicial precedent creates an additional problem, while a fourth, and final, problem arises from the quicksilver nature of regulation itself: revocable, amendable and endlessly flexible.

The police power's broad basis of legitimacy in health, safety, general welfare and morals results in a hard-to-categorize array of regulatory acts.[52] In a land use context, the police power can be exercised to segregate residential and industrial areas,[53] extinguish noxious uses[54] and postpone development,[55] subject only to basic substantive and procedural due process limitations. An act of regulation does not always result in a regulatory taking, while eminent domain proceedings always take property.[56] As Justice Holmes noted in *Pennsylvania Coal Company v. Mahon*:[57]

> Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power.[58]

In eminent domain proceedings, title passes to the govern-

50. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962) (prohibition of gravel extraction below the water table); Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983) (state Department of Natural Resources ruling regarding ordinary high water mark); Agins v. Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) (imposition of open space restrictions); Cordeco Development Corp. v. Santiago Vasquez, 539 F.2d 256 (1st Cir. 1976) (local government refused to issue a sand extraction permit).

51. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

52. 1 NICHOLS, *supra* note 1, §1.42; Mugler v. Kansas, 123 U.S. 623 (1893).

53. Euclid v. Ambler, 272 U.S. 365 (1926).

54. Mugler v. Kansas, 123 U.S. 623 (1893). *See also* Goldblatt v. Hempstead, 369 U.S. 590 (1962), and Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972).

55. Golden v. Planning Bd., 30 N.Y. 2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).

56. Hagman, 33 LAND USE LAW & ZONING DIGEST 5 (May, 1981).

57. 260 U.S. 393 (1922).

58. *Id.* at 413.

ment, which appropriates the land for public use.[59] Ordinarily, an act of regulation neither transfers title to the government, (although it may result in a de facto transfer of ownership),[60] nor confers the right to use or possession of private property to the government.[61]

Eminent domain criteria are not decisive in most regulatory taking cases. Early cases quickly recognized that, even absent formal eminent domain proceedings, a de facto condemnation could occur.[62] These cases generally relied on finding governmental acts which resulted in a physical invasion of property.[63] The physical invasion standard, while useful,[64] does not resolve the regulatory taking issue. A regulation may deprive an owner of the use and benefit of land without conferring any rights of possession or use on the public.[65]

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59. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); *see also* Berman v. Parker, 348 U.S. 26, 33 (1954).

60. *See* Hughes v. Washington, 389 U.S. 290 (1967); *see also* Zinn v. State, 112 Wis. 2d 417, 334 N.W. 2d 67 (1983), in which a state Department of Natural Resources ruling regarding the location of the ordinary high water mark effectively transferred 200 acres of plaintiff's lakefront property to the state.

61. *See* Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976), however, where New York City placed two private parks into a special park district and opened them to the public.

62. Inverse condemnation is the appropriate remedy in such cases. The owner is permitted to bring suit against the government for just compensation if his property is taken or damaged for public use and no eminent domain proceedings have been instituted. *See* United States v. Clarke, 445 U.S. 253, 257 (1980). In California, the remedy is frequently sought where government activity produces landslides which affect land that has not been condemned. *See, e.g.*, Souza v. Silver Development Co., 164 Cal. App. 3d 165, 210 Cal. Rptr. 146 (1985); Yee v. City of Sausalito, 141 Cal. App. 3d 917, 190 Cal. Rptr. 595 (1983).

63. *See* United States v. Causby, 328 U.S. 256 (1945), which found that bomber overflights from a military airport "took" the plaintiff's property. In finding the taking, the court first decided that the owner had a cognizable property interest in as much airspace as he could reasonably use in connection with his on-ground activities. *Id.* at 264. The court then found that that airspace had been invaded by the overflights, which constituted a taking because they were a direct and immediate interference with the owner's use and enjoyment of his land. *Id.* at 264-65.

64. *See* Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979). In *Kaiser*, the Supreme Court struck down a lower court ruling that a private developer's ocean channel had turned its marina into navigable federal waters open to the public.

65. The so-called "open space" easements are a prime example. Although the owner's use is restricted in order to prevent development, the public seldom acquires an affirmative right to use the property. *But see* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976), for an example of an ordinance which apparently contemplated "forcing" recreational use of private property by using the open space designation. The battle over the Palo Alto, California, foothills has been a source of considerable litigation. *See also* Eldridge v. City

The case law on regulatory takings is inconsistent. At the federal level, taking standards vacillate between two primary philosophical strains: the so-called proprietary interest test[66] established by Justice Harlan in *Mugler v. Kansas*[67] and the more flexible continuum test[68] announced by Justice Holmes in *Pennsylvania Coal Company v. Mahon.*[69] In *Mugler*, Justice Harlan rejected a due process challenge to a Kansas dry law which prohibited the manufacture of beer for sale.[70] Justice Harlan warned that an exercise of the police power was never a taking or compensable since it was totally distinct from the power of eminent domain.[71] The ordinance in question, he held, was a legitimate exercise of the police power because it abated a nuisance[72] and did not involve physical invasion or appropriation of the property by the government.[73] For Justice Harlan, there was a qualitative difference between the police power and the power of eminent domain.[74]

Twenty-nine years later, in *Pennsylvania Coal Company v. Mahon*, Justice Holmes rejected Justice Harlan's view that the two powers were distinct and theorized that a regulation that went "too far" could be recognized as a taking,[75] finding a quantitative rather than a qualitative difference between the powers. Justice Holmes' continuum test and Justice Harlan's proprietary interest test, like oil and water, do not mix well.

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of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), *vacated* 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), where an intermediate appellate court found a compensable regulatory taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) is arguably another example of the fact that a regulation can "take" land without conferring any affirmative benefit on the public. The benefit conferred by the Kohler Act in that case - the support pillars - would have devolved on the private property owners, not the public.

66. Mugler v. Kansas, 123 U.S. 623 (1893). Justice Harlan felt a regulation could never be a taking as there was no governmental invasion or appropriation. *Id.* at 668-69. *See* also Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976).

67. 123 U.S. 623 (1893).

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

69. *Pennsylvania Coal*, 260 U.S. 393.

70. *Mugler*, 123 U.S. at 654-56.

71. *Id.* at 668-69.

72. *Id.* at 662.

73. *Id.* at 668-69.

74. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 39 (1964).

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

In 1984, *Hawaii Housing Authority v. Midkiff*[76] placed the Supreme Court squarely in the Holmes camp.[77] However, the ongoing conflict between the two judicial strains has spawned a perplexing ambiguity in present state and federal court standards for regulatory taking.[78] Some courts continue to rigidly distinguish between regulation and appropriation, holding that the only remedy for an improper exercise of the police power is invalidation under the Fourteenth Amendment as a taking of property without due process.[79] Others more readily find compensable takings,[80] even when the ordinance in question survives due process scrutiny.[81] Still others agree that a regulation can effect a Fifth Amendment taking, but insist that compensation is due only if the taking is permanent.[82] The result is a "serbonian bog".[83] Modifications in the federal taking standard further complicate the equation. Justice Holmes attempted to provide a yardstick for measuring the "too far" he referred to in *Pennsylvania Coal* by noting that diminution of property value was one factor for consideration.[84] When diminution reached a certain magnitude, an exercise of eminent domain and compensation were required to sustain the regulatory act.[85] The *Penn Central*[86] decision expanded Justice Holmes' test into a three-pronged inquiry into the impact of the regulation on the claimant, the degree of interference with distinct investment-backed expectations, and the character of the governmental action,

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76. 467 U.S. 229 (1983).

77. *Id.* at 240. *Accord* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984).

78. Sax, *supra* note 74, at 42.

79. *See* Agins v. Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

80. Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981).

81. *See* Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), *vacated* 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979). In *Eldridge*, the landowner conceded that the ordinance was a valid exercise of the police power, but insisted it effected a taking nonetheless. *Id.* at 617, 129 Cal. Rptr. at 577. The California Court of Appeals agreed. *Id.* at 631-33, 129 Cal. Rptr. at 586-87.

82. *See* Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938).

83. *See* Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L.REV. 711 (1982). The author uses the phrase to refer to state approaches to the taking issue, but it is equally applicable to the federal courts. The phrase has been used in numerous judicial opinions to describe the "marshlands" where the allegedly separate police power and eminent domain intersect: City of Austin v. Teague, 570 S.W.2d 389, 391 (Tex. 1978), Brazos River Authority v. City of Graham, 163 Tex. 167, 176, 354 S.W.2d 99, 105 (1962).

84. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

85. *Id.*

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

including whether it involved physical invasion.[87] The most recent cases appear to have crystallized the three-pronged test into something of a dogma.[88] In addition, the Court now requires that a cognizable property interest be taken[89] and that the finality requirement be met.[90]

The problem of defining taking standards is further complicated by the fact that land use regulations are not an "all-or-nothing" proposition.[91] Zoning can be changed or invalidated, regulations amended or revoked.[92] Denial of a particular development plan is not equivalent to an agency's refusal to permit any development.[93] The impermanence problem clearly troubles courts struggling to develop a regulatory taking standard. The Supreme Court appears willing to find a taking despite the impermanence of most land use regulations.[94] However, its early frustration with an applicant's failure to exhaust administrative remedies[95] has crystallized into a doctrinal insistence on exhaustion as part of the taking standard.[96] Unfortunately, institutionalization of the exhaustion requirement does not clarify what is final in a land use context. A Rubik's cube of interlocking administrative agencies may provide virtually inexhaustible — though fruitless — opportunities to reapply or appeal.

Superimposing the eminent domain model on an exercise of the police power does not produce reliable standards for the

87. *Id.* at 124.

88. *See* Ruckelshaus v. Monsanto Co., 476 U.S. 986, 1005 (1984); PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

89. *Ruckelshaus*, 476 U.S. at 1000-01; *Penn Central*, 438 U.S. at 130.

90. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2566 (1986); Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108, 3117 (1985).

91. *MacDonald*, 106 S. Ct. at 2565.

92. *See* Berger and Kanner, *supra* note 26, at 700, who characterize the regulatory system as "a monumental crap game".

93. *MacDonald*, 106 S. Ct. at 2565.

94. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting): "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable."

95. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136-37 (1978). The Court found that the Landmark Preservation Commission's refusal to approve the two plans submitted did not amount to a blanket denial of any development of the airspace above the terminal. This finding was an important corollary to its holding that no taking had been effected. *Id.* at 138.

96. *See MacDonald*, 106 S. Ct. at 2566; and Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108, 3117 (1985).

regulatory taking. Debating the appropriate remedy for an excessive regulation does not provide standards either. As noted in a recent taking case,[97] viewing a regulation that goes "too far" as a taking or an invalid exercise of the police power does not resolve what "too far" is.[98]

II. MODIFICATIONS TO CURRENT REGULATORY TAKING THEORY CAN PRODUCE A WORKABLE STANDARD

Three modifications to current taking theory will help clarify when a taking has occurred: clarification of the property interest at stake, addition of a circumstantial review standard, and definition of the finality requirement.

A. THE PROPERTY INTEREST

Property, in a constitutional sense, is not a physical thing, but a group of rights which the owner of the thing has regarding it.[99] Although the Constitution requires just compensation for the taking of property,[100] property interests are not created by the Constitution, but by existing rules or understandings that stem from independent sources, including state law.[101]

It is not at all clear that economic value is a property interest.[102] The community defines property[103] and creates property

97. *Williamson*, 105 S. Ct. 3108.

98. *Id.* at 105 S. Ct. 3123-24.

99. United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945).

100. U.S. Const. amend V, cl. 4.

101. Ruckelshaus v. Monsanto Co., 476 U.S. 986, 1001 (1984); Board of Regents v. Roth, 408 U.S. 564, 577 (1971). *See generally* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L.R. 1165 (1967), and Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). Michelman advances a utility theory of property. He claims that productivity is dependent on the existence of reliable rules regarding the relationship of citizens to resources, and that regulation should be compensable only if it has a net demoralizing impact. Michelman at 1212-13. Sax, on the other hand, adopts a vision of property as a system of interrelated, competing uses, and feels regulation should be compensable only if the effects of the regulated activity are contained within the boundaries of the designated property and do not "spillover". Since most uses do have spillover effects, he would find few regulations compensable. Sax at 150, 161-63.

102. Sax, *supra* note 74, at 51-53. *See also* Andrus v. Allard, 444 U.S. 51, 66 (1979): "[L]oss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a takings claim." Because of its uncertainty, an interest in anticipated gains has traditionally been viewed as less compelling than other prop-

values.[104] Since, as Justice Holmes observed, some values are subject to an implied limitation,[105] the courts have been chary of finding that existing value was a property interest for purposes of the Fifth Amendment.[106] Instead of an automatic compensation requirement for any regulatory impact on value, the Supreme Court adopted the "diminution of value" standard, under which an excess of value must be taken before compensation is due.[107]

Focusing on value as the primary property interest at stake is misplaced. Justice Brennan wrote in *Penn Central* that diminution in value alone could not create a taking.[108] The courts have excused regulatory impacts which almost wholly devalued property.[109] The value of land arises from its usefulness,[110] and land can be diminished in value without denying all use.[111] In a regulatory context, the diminution of value is a result of the restriction of use. Therefore, the focus should be on the cause — the restriction — not on the diminished value, which is only an effect. The restriction of use rather than the diminution in value should be determinative.[112]

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erty related interests. *Id.* at 66.

103. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

104. Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 597, 385 N.Y.S.2d 5, 11, 350 N.E.2d 381, 387 (1976).

105. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

106. *Andrus*, 444 U.S. at 66: "[B]ecause of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."

107. *Pennsylvania Coal*, 260 U.S. at 413. *See also* Golden v. Planning Bd., 30 N.Y. 2d 359, 381, 334 N.Y.S.2d 138, 155, 285 N.E.2d 291, 304 (1972): "Diminution . . . is a relative factor and though its magnitude is an indica of a taking, it does not of itself establish a confiscation."

108. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978); *see also Andrus*, 444 U.S. at 66, regarding the insufficiency of loss of future profits to establish a taking.

109. *See supra* notes 36, 37 and 38.

110. Keystone Associates v. Moerdler, 19 N.Y. 2d 78, 88, 278 N.Y.S.2d 185, 189, 224 N.E.2d 700, 703 (1966), citing Forster v. Scott, 136 N.Y. 577, 584, 32 N.E. 976, 977: "All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession." *See also* Piper v. Ekern, 180 Wis. 586, 592, 194 N.W. 159, 162 (1923), and Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 597, 385 N.Y.S.2d 5, 11, 350 N.E.2d 381, 387 (1976).

111. *See generally Penn Central*, 438 U.S. at 130-31.

112. Sheerr v. Evesham Township, 184 N.J. Super. 11, 54, 445 A.2d 46, 69 (1982). *See also Penn Central*, 438 U.S. at 130-31 (diminution in value alone is not a taking; the court must focus on remaining permitted uses). *Accord* Zinn v. State, 112 Wis. 2d 417,

A regulatory taking does not require deprivation of all use. The cases seem to draw the line not at deprivation of all use but at deprivation of profitable use of property.[113] Some courts find that deprivation of reasonable or beneficial use results in a taking.[114] Others couch the taking in terms of deprivation of the economically viable use of land,[115] or the right to possess and exploit.[116] While it is clear that deprivation of all use is a taking,[117] the deprivation of income productive use seems to be the critical factor.[118]

In *Morris County Land Investment Company v. Parsippany-Troy Hills Township*,[119] the New Jersey Supreme Court invalidated a Meadow Zone Ordinance which restricted the owner of 66 lowland acres to passive uses such as conservation, aquaculture and agriculture.[120] Such uses, the court found, were quasi-public, afforded no financial return to the owner and amounted to a freeze on use.[121] The court agreed that a

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424, 334 N.W.2d 67, 70 (1983); Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938). *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 646-53, (Brennan, J., dissenting). Justice Brennan seems to refer to deprivation of use as the equivalent to economic impact on property. *Id.* at 646-53. The interests are distinct, but the failure to distinguish them is not unusual and is indicative of the need to clarify the property interest at stake in a taking case. Permitted uses obviously impact value, but that does not mean the two property interests are identical. *See* Bauman, *supra* note 26, at 31.

113. Note, *Money Damages for Regulatory Takings*, 23 NAT. RES. J. 711, 719 (1983). *Contrast* Justice Brennan's *San Diego Gas* test (deprivation of "use and enjoyment", 450 U.S. at 656-57) with the Fifth Circuit's characterization of the standard in Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir. 1981), *cert. denied* 455 U.S. 907 (1982) (denial of "economically viable use").

114. *San Diego Gas*, 450 U.S. at 652 (Brennan, J., dissenting); Usdin v. State Dept. of Environmental Protection, 173 N.J. Super. 311, 323, 414 A.2d 280, 286 (1980); Just v. Marinette, 56 Wis. 2d 7, 15, 201 N.W.2d 761, 767 (1972); Golden v. Planning Bd., 30 N.Y. 2d 359, 285 N.E.2d 291 (1972).

115. *See* Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1980); Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976). The *Burrows* case dealt with whether there was a taking under the state constitution.

116. United States v. Causby, 328 U.S. 256, 262 (1945).

117. United States v. General Motors Corp., 323 U.S. 373, 378 (1945); Zinn v. State, 112 Wis. 2d 417, 429, 334 N.W.2d 67, 73 (1983); Morris County Land Inv. Co. v. Parsippany-Troy Hills Township, 40 N.J. 539, 557, 193 A.2d 232, 242 (1963); Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 226, 15 N.E.2d 587, 589 (1938).

118. Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 590-91, 385 N.Y.S.2d 5, 7, 350 N.E.2d 381, 383 (1976); *Parsippany* at 557, 193 A.2d at 242.

119. 40 N.J. 539, 193 A.2d 232 (1963).

120. *Id.* at 545, 193 A.2d at 236.

121. *Id.* at 552-53, 193 A.2d at 240.

regulation was confiscatory when it so restricted use that the land could not practically be utilized for any reasonable purpose or when the only permanent uses were those to which the property was not adapted or which were economically infeasible.[122] Admittedly, land in its natural state can still be used.[123] Notwithstanding a minority view which found that restriction to natural use was not a taking,[124] such restrictions seem to be a compensable Fifth Amendment violation since the public uses — primarily open space — are so encompassing that they prevent the owner's exercise of his right to use or benefit.[125]

Although the right to use is already recognized as a property interest,[126] viewing it as a fundamental property interest would simplify taking standards and valuation. Ordinarily, taking a discrete property interest, destroying one strand in the bundle of property rights, does not constitute a taking[127] "because the aggregate must be viewed in its entirety".[128] Taking a fundamental property right, however, even if it is only a single strand in the bundle, triggers the Fifth Amendment.[129]

While the Supreme Court has taken an expansive view of what constitutes property for taking purposes,[130] it has been reticent regarding which property rights are fundamental.[131] It is clear that the right to exclude is a fundamental property right.[132]

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122. *Id.* at 557, 193 A.2d at 242.

123. *See* Just v. Marinette, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

124. *Id.*

125. Morris County Land Inv. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 555-56, 193 A.2d 232, 241-42 (1963).

126. United States v. General Motors Corp., 323 U.S. 373, 378 (1945); Piper v. Ekern, 180 Wis. 586, 593, 194 N.W. 159, 162 (1923).

127. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978).

128. Andrus v. Allard, 444 U.S. 51, 66 (1979).

129. *Id.*

130. *See* Ruckelshaus v. Monsanto Co., 476 U.S. 986 (1984) (trade secrets); Armstrong v. United States, 364 U.S. 40 (1959) (business interests, including a security interest in chattels); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (right to engage in a particular business); Lynch v. United States, 292 U.S. 571, 577 (1934) (interest in insurance contract). *See also* Johnson, *Compensation for Invalid Land Use Regulations,* 15 GA. L.REV. 559, 581 (1981).

131. Johnson, *supra* note 130, at 569.

132. PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). *See also Ruckelshaus,* 476 U.S. at 1011, which held that the government's disclosure of trade secrets in the process of conducting FIFRA licensing "took" the right to exclude; such disclosure, the court found, resulted in loss of the property interest.

However, it is not clear what other property rights are fundamental since the Supreme Court has not given us any criteria for making such determinations.[133] However, criteria can be extracted.

The reason the right to exclude is a fundamental property right is because it is directly related to an owner's right to use his property;[134] without it, property ownership is meaningless.[135] In *PruneYard Shopping Center v. Robins*,[136] the United States Supreme Court held that forcing a California shopping center to allow the circulation of petitions on its premises was not a taking because the center failed to show that exclusion of the petitioners was essential to protect the center's usefulness or value.[137] Based on *PruneYard*, it appears that the right to exclude is a fundamental property interest only when it is essential to maintain use and value, which is based on use. If this is true, then the right to use is an even more fundamental property interest than the right to exclude. The United States Supreme Court recognized in 1893 that the adequacy of the protection given the individual in his use and enjoyment of property is one of the most certain tests of the character of government.[138] The right to beneficial use must be recognized as the fundamental property interest at stake in a regulatory taking.[139]

The right to use is a concept which can be manipulated.[140] Uses can be classified as active or passive, present or prospective. In deciding whether the right to use has been taken, courts generally focus on whether a regulation deprives an owner of all active uses, not on whether it denies him additional uses. In *Penn Central*, Justice Brandeis focused on the existence of remaining permitted uses in evaluating whether a regulatory

133. Johnson, *supra* note 130, at 569.

134. *PruneYard*, 447 U.S. at 84.

135. Berger and Kanner, *supra* note 26, at 722.

136. 447 U.S. 74 (1980).

137. *Id.* at 84.

138. Monongahela Navigation Co. v. United States, 148 U.S. 312, 324 (1893).

139. Berger and Kanner, *supra* note 26, at 722, agree: "It should be self-evident that, of all the rights arising from the concept of property, the right to *use* property in a lawful, reasonable, peaceful and profitable manner is the most fundamental." (Emphasis original).

140. *See* Just v. Marinette, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), which held that enjoyment of shoreline property in its natural state was reasonable use.

taking had occurred.[141] The City of New York denied the Penn Central Transport Company the right to build in the airspace above Grand Central Station because of the building's landmark status.[142] Justice Brandeis, writing for the majority, found that although the ordinance did not permit development of the airspace, it did not interfere with existing uses which permitted a reasonable return on Penn Central's investments.[143] In *Morris County Land Investment Company v. Parsippany-Troy Hills Township*,[144] however, the New Jersey Supreme Court found that the owner was restricted to passive conservation uses of his 66 acres of swamp because township ordinances prohibited reclamation.[145] As a result, the court found that the township had confiscated the land.[146] If the effect of a regulation is to prevent all active use, then a taking has occurred and compensation is due.[147]

Local government cannot avoid the taking issue by arguing that a property interest does not exist. Although property rights arise under rules and understandings stemming from sources such as state law,[148] whether such entitlements exist is a question of federal constitutional law.[149]

State efforts to limit an owner's right to use may conflict with the Supremacy Clause[150] in two ways:

1. Rights to use can arise from sources other than state law. *Board of Regents v. Roth*[151] indicates that property rights arise from "sources *such as* state law."[152] The case language is an illustrative, not an exclusive, indication of the sources of property

141. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136 (1978).
142. *Id.* at 115-18.
143. *Id.* at 136.
144. 40 N.J. 539, 193 A.2d 232 (1963).
145. *Id.* at 557, 193 A.2d at 243.
146. *Id.*
147. *Id.* at 557, 193 A.2d at 242.
148. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
149. O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 796 (1980) (Blackmun, J., concurring).
150. Article VI of the United States Constitution provides: "This Constitution . . . shall be the supreme Law of the Land . . . any Thing . . . in the Laws of any State to the Contrary notwithstanding."
151. 408 U.S. 564 (1972).
152. *Id.* at 577. (Emphasis added).

rights. A state cannot decide whether or not a property right arising outside state law exists.

2. Federal and state standards regarding the existence of a right to use may conflict. For example, the Supreme Court has indicated that the presence of reasonable or distinct investment-backed expectations is one of the factors to be considered in evaluating whether a taking has occurred.[153] The treatment of the phrase in the case law and legal literature indicates that investment-backed expectations are a property interest.[154]

The Supreme Court's admonition that distinct investment-backed expectations must be "more than a 'unilateral expectation or an abstract need' "[155] sounds suspiciously like its characterization of property in *Board of Regents v. Roth*.[156] Furthermore, since "economic impact on the owner" is treated as a separate taking inquiry in the more recent cases,[157] the Court apparently means distinct investment-backed expectations to be more than mere economic loss.[158]

A right to use may exist based on the federal "expectations" standard even though state law does not recognize a property interest. In California, for example, a developer has no protected

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153. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). *Accord* Connolly v. Pension Guaranty Corp., 106 S. Ct. 1018, 1026 (1986); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

154. *See* Michelman, *supra* note 101, at 1232-33. Michelman seems to feel that at some point an owner's expectations of use become a right to use, based on the size and reasonableness of his investment in those expectations. *Id.* at 1233. The Michelman article was apparently the source of the *Penn Central* reference to "distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. *See* Bauman, *supra* note 26, at 23 n.34.

155. *Ruckelshaus*, 467 U.S. at 1005, *quoting* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980).

156. 480 U.S. 564, 577 (1972).

157. Connolly v. Pension Benefit Guaranty Corp., 106 S. Ct. 1018, 1026 (1986); *Ruckelshaus*, 467 U.S. at 1005.

158. Unfortunately, the Court has done little to clarify when investment-backed expectations are distinct or reasonable. It is unclear, for example, whether reasonableness is related to the strength of the state's interest or the reasonableness of state law. If the state's regulatory interest relates to preservation of a flood plain, is the strength of an owner's investment-backed expectations less than if the state has an interest in open space? Is the standard for reasonableness higher in a jurisdiction like California where an owner knows he will have no vested rights until he pulls his permits and completes substantial work? The parameters of distinct investment-backed expectations are far too indistinct.

property interest in a use until the right vests[159]— and no vested right until he pulls his building permits and completes substantial work in reliance on the permits.[160] An owner may have distinct investment-backed expectations in a use long before he pulls his building permits. Local government cannot abridge that interest without paying just compensation by arguing that no property interest exists to be taken.[161] Under the Supremacy Clause, federal constitutional law governs whether that interest exists and whether it has been taken. Property rights are protected not because the states give them protected status, but because the Constitution insists on their protection.[162]

B. The Circumstantial Review Standard

The blurring of the distinction between the eminent domain and police powers makes the principal legal tests for regulatory taking inadequate.[163] Justice Harlan's proprietary interest test, with its emphasis on physical invasion or appropriation, is not sensitive to land use situations where an owner's use is taken without the use or fee being transferred to the public. The Holmes test, which focuses on diminuation in value and treats the eminent domain and police powers as points on a continuum, and its spin-off, the *Penn Central* balancing test,[164] result in confusion.[165] Since value is a function of an owner's ability to use, the Holmes' test focuses on the wrong property interest.

Most courts, under either test, have recognized that regulatory takings are a product of a state's acts, not its expressed

159. Del Mar v. Coastal Comm'n, 152 Cal. App. 3d 49, 52, 199 Cal. Rptr. 225, 226-32 (1984); Pescosolido v. Smith, 142 Cal. App. 3d 964, 969-70, 191 Cal. Rptr. 415, 418-19 (1983).

160. Contra Costa Theatre, Inc. v. City of Concord, 511 F. Supp. 87, 89 (D.C. Cal. 1980); Blue Chip Properties v. Permanent Rent Control Bd., 170 Cal. App. 3d 648, 658-59, 216 Cal. Rptr. 492, 497 (1985).

161. Appellant's Reply Brief at 19-20, MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986) (No. 84-2015).

162. Tribe, American Constitutional Law, §9-4, at 465 (1978).

163. City of Austin v. Teague, 570 S.W.2d 389, 391 (Tex. 1978).

164. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

165. Bauman, *supra* note 26, at 24.

intent.[166] As the Supreme Court noted in *Hughes v. Washington*:[167]

> [T]he Constitution measures a taking of property not by what a state says, or by what it intends, but by what it *does*. (emphasis original)[168]

As a result, many courts are now moving toward a circumstantial review standard.

The test under the circumstantial standard is whether "there exists some combination of factors which, in context, convincingly suggest that the cumulative effect of the regulatory course of conduct has been to work a de facto appropriation of private property without compensation".[169] An exercise of the police power is presumed valid, and the courts generally defer to regulatory acts.[170] However, the courts can look at the prior history, nature and scope of the government's behavior in deciding whether there has been an oppressive confiscation.[171]

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166. Hughes v. Washington, 389 U.S. 290, 298 (1967). In *Hughes*, the plaintiff challenged a Washington State Statute which would have reversed a common law rule that accreted ocean-front land belonged to adjacent property owners, not the state. The Supreme Court went on to say that "[a]lthough the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property - without paying for the privilege of doing so." *Id.* at 298. *See also* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978), *citing* Hughes v. Washington, 389 U.S. 290, 298 (1967): "In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."; Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962, 977 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976): "Distinguishing between the exercise of the two powers is not always easy . . . [w]hich of the powers is being used does not necessarily appear from the form in which the community puts its action." *See generally* Bauman, *supra* note 26, at 25, describing "the Supreme Court's consistent pattern of judging the effects of government action rather than dwelling on the mode of government operation."

167. 389 U.S. 290 (1967).

168. *Id.* at 298.

169. *See* Comment, *supra* note 83, at 738. According to the author, factors relevant to the consideration of whether the government's course of conduct has effected a taking would include: repeated public pronouncements of intent to employ the property for public use, condemnation threats, institution and abandonment of eminent domain actions, inclusion of the property in general zoning plans or studies, its identification as property targeted for acquisition in a bond or referendum election, its professed utility in terms of proximity to ongoing public activity, the timing of various regulatory actions, and variations in taking policy. *Id.* at 738.

170. Mugler v. Kansas, 123 U.S. 623, 661 (1887); Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962, 979 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976); Golden v. Planning Bd., 30 N.Y. 2d 359, 377, 334 N.Y.S.2d 138, 151, 285 N.E.2d 291, 301 (1972). *See also* Berger and Kanner, *supra* note 26, at 706, who feel that under the coterminus theory of the police and condemnation powers, a regulatory act should receive as much judicial deference as an exercise of eminent domain.

171. *Arastra*. 401 F. Supp. at 979.

Circumstantial review is not the same thing as the "continuum approach",[172] which finds a regulation a taking when it goes "too far".[173] Instead, it broadens the taking inquiry beyond the regulation and extends it to the impact of the regulation on the particular piece of property and the entire course of the government's conduct[174] in light of community conditions[175] and environmental factors.[176] It should also incorporate the factors balanced in the *Penn Central* case: the economic impact on the property owner and the importance of the state's interest.[177] The circumstantial standard is already recognized in many of the federal taking cases,[178] and has been applied in state cases as well.[179] A comparison of three cases illustrates the advantages of using the circumstantial review standard. In *Arverne Bay Construction Company v. Thatcher*,[180] the owner of residentially zoned property applied for a variance to build a gas station. His application denied, he sued for a taking.[181] The court found that the ordinance effected a taking because the property was wholly unfit for residential use: an open sewer was located 1200' from

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

173. *Id.*

174. Comment, *supra* note 83, at 733.

175. *See* Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938), in which the owner of land zoned residential applied for a variance for a gas station. The owner and the City's experts agreed that the property couldn't be profitably used for residential purposes: there was no residential pressure in plaintiff's area and would be none for the foreseeable future. Denied a variance, the owner challenged the ordinance and the court invalidated it on the basis that an ordinance which so impacts property that it can't be used for any reasonable purpose was a taking.

176. *See* MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986). In *MacDonald*, the plaintiff's land was zoned Agricultural Preserve after he applied for approval of a subdivision map. However, since a foot of topsoil had been removed to build nearby Interstate 80, and since the land was infested with pests, it was clearly unsuitable for agricultural uses. Appellant's Brief at 6, MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986) (No. 84-2015).

177. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

178. "Ad hoc factual inquiry" - *MacDonald*, 106 S. Ct. at 2566; Ruckelshaus v. Monsanto Co., 476 U.S. 986, 1005 (1984); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 649 (1981) (Brennan, J., dissenting); *Penn Central*, 438 U.S. at 124. "Question turning upon the particular circumstances of each case" - United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

179. *See Arverne*, 278 N.Y. 222, 15 N.E.2d 587. *See also* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976), and Morris County Land Inv. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963). In both cases, the courts found takings based on the entire course of the government's conduct, not merely on the basis of the regulation in question.

180. 278 N.Y. 222, 15 N.E.2d 587 (1938).

181. *Id.* at 225, 15 N.E.2d at 589.

the property line and the City's incinerator had been built nearby.[182] On-site conditions were not likely to change enough in the future to allow the plaintiff to put the land to profitable use.[183] Had the effect of the regulation in light of on-site conditions amounted only to a temporary inconvenience, the court would have been less willing to find a taking.[184]

In *Golden v. Planning Board of Town of Ramapo*,[185] the Town of Golden adopted an ordinance which potentially stalled development for 18 years. Although the ordinance was attacked on due process grounds,[186] the court sustained it because, unlike *Arverne's*, it did not permanently restrict development:[187] it allowed acceleration of development by owners who were willing to install capital improvements such as sewer and water and reduced property taxes during the effective period of the ordinance.[188]

The results in jurisdictions which do not use circumstantial review can be harsh. California, for example, continues to insist that an exercise of the police power can never effect a taking.[189] In *MacDonald, Sommer & Frates v. County of Yolo*,[190] a recent California case, the owner of a 44-acre parcel located in Yolo County applied to the County for a subdivision map. The County denied the application because the property lacked sewer and water services, had no street access and insufficient fire and police protection.[191] However, these deficiencies were attributable to government action. The nearby City of Davis had redrawn its street maps to isolate the land and refused dedication of streets the owner agreed to build himself. The County refused to supply sewer services,[192] and delivered the final blow when it determined that the land could be used only for agricul-

182. *Id.* at 230, 15 N.E.2d at 591.
183. *Id.* at 232, 15 N.E.2d at 592.
184. *Id.*
185. 30 N.Y. 2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).
186. *Id.* at 369, 334 N.Y.S.2d at 144, 285 N.E.2d at 296.
187. *Id.* at 382, 334 N.Y.S.2d at 155, 285 N.E.2d at 304.
188. *Id.*
189. Agins v. Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979).
190. 106 S. Ct. 2561 (1986).
191. Appellant's Brief at 7, MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986) (No. 84-2015).
192. *Id.* at 6.

tural purposes.[193] In light of the fact that a foot of topsoil had been stripped from the land and it was infested with ineradicable pests, it was clearly unusable for agricultural purposes.[194] The lower courts found the plaintiff's factual allegations inadequate to state a taking. They went on to hold that, regardless of such insufficiency, money damages for inverse condemnation were foreclosed as a matter of California law.[195] The United States Supreme Court refused to overturn the state decision because the plaintiff had not exhausted all administrative remedies.[196] Had any of the courts applied the circumstantial review standard, the result might have been less harsh.

C. The Finality Requirement

Judicial relief from a regulatory act is not available until the prescribed administrative remedies have been exhausted,[197] and a final administrative decision obtained.[198] The absence of a final administrative decision has been fatal in almost all of the major Supreme Court taking cases in the land use area.[199] The last two major cases, *Williamson Planning Commission v. Hamilton Bank*[200] and *MacDonald, Sommer & Frates v. County of*

193. *Id.* at 7.

194. *Id.* at 6-7.

195. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2564 (1986).

196. *Id.* at 2567-68.

197. Myers v. Bethlehem Shipbuilding, 303 U.S. 41, 50-51 (1938).

198. Prince George's County v. Blumberg, 288 Md. 275, 283, 418 A.2d 1155, 1160 (1980). *See* cases cited *infra* note 199.

199. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 633 (1981) (The Supreme Court rejected jurisdiction, holding that there was no final decision in the lower court as to whether the regulation in question had effected a taking); Agins v. City of Tiburon, 447 U.S. 255, 260, 262-63 (1980) (Plaintiffs failed to submit a specific development plan, with the result that the Court found there was "as yet no concrete controversy regarding the application of the specific zoning provisions"); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978) (Plaintiff's failure to submit an application for a smaller structure resulted in Court's inability to determine whether all rights to use airspace above the terminal were denied). *See also MacDonald*, 106 S. Ct. 2561, 2568-69 (1986) (Plaintiff had received county's response to one subdivision proposal, but had yet to receive final position regarding application of regulation to his land); Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108, 3117-18 (1985) (Plaintiff failed to seek variances which would have removed five of the County's eight objections to its submitted plat).

200. 105 S. Ct. 3108 (1985).

Yolo[201] make it clear that the need for a final administrative decision has now become part of the taking formula.[202]

Although some critics charge that the courts are using the exhaustion requirement to avoid finding takings,[203] there are legitimate reasons for insisting on finality. Until an owner has the final application of a regulation to his property, it is impossible to tell whether the land retains any reasonable beneficial use.[204] The requirement may help clarify whether the government intends to appropriate.[205] The intimidation of zoning and planning personnel by the prospect of taking awards,[206] and the financial burden on cities of paying for regulatory acts [207] are frequently cited as reasons for requiring finality in a land use context.[208] Government may not always be aware that a regulation takes property; forcing an owner to exhaust administrative remedies allows government to foresee a taking and to plan for it financially.[209]

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201. 106 S. Ct. 2561 (1986).

202. *MacDonald*, 106 S. Ct. at 2566; *Williamson*, 105 S. Ct. at 3117.

203. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HAST. L.Q. 491, 513 n.72 (1981).

204. *Williamson*, 105 S. Ct. at 3121.

205. *See* Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 n.27 (5th Cir. 1981). The *Hernandez* court felt that the government should be given a chance to review any legislation whose application to particular land constituted a prima facie taking. Other authorities agree. *See* Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, Part 1, 4 ZONING AND PLAN. L. REPT. 129, 134-35 (1981).

206. It seems a usurpation of legislative power for a court to force compensation. Agins v. Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979). *See* Johnson, *supra* note 130; Johnson feels that, due to the huge amount of zoned land, requiring compensation for all zoning losses would remove land use regulation from the scope of the police power. She notes courts are traditionally reluctant to act as super zoning commissions. *Contrast* Berger and Kanner, *supra* note 26, at 751, who reject the idea that government officials will be "sandbagged", and who note that land use decisions "are the product of study and public hearings." *See also* Comment, *supra* note 83, at 726-32; the author feels that fears of fiscal disaster may indicate that planners know they are exceeding constitutional limits. *Id.* at 727. *See also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting): "After all, if a policeman must know the Constitution, then why not a planner?"

207. *See* Michelman, *supra* note 101. He feels a stringent compensation requirement will raise social costs and force abandonment of important projects. *Id.* at 1222. *See also* Comment, *supra* note 83, at 726-28. The Supreme Court rejected the fiscal disaster scenario in Owen v. City of Independence, 445 U.S. 622, 656 (1980). *See also* Hagman, *supra* note 205. Hagman also rejects the fiscal argument. He feels that if requiring compensation would impose staggering losses on cities, it is only because developers are already bearing staggering losses. *Id.* at 133.

208. Comment, *supra* note 83, at 726-32.

209. *Id.* at 731; Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir. 1981);

Insisting on exhaustion also reduces the burden on the courts,[210] provides for the resolution of issues by agencies which are familiar with local conditions[211] and prevents the courts from interfering unnecessarily in local land use decisions.[212] The finality requirement avoids the constitutional resolution of issues which can be otherwise disposed of.[213] The failure to obtain a final determination of permitted use may amount to a facial attack on an ordinance. Courts are reluctant to deal with the facial constitutionality of a regulation,[214] since such adjudication often involves separation of powers problems. Requiring that administrative remedies be exhausted prevents such facial attacks.

Unfortunately, it is hard to know when a land use decision is final. Regulations are seldom "final", since variances, rezonings and conditional uses are often available.[215] Rejected development plans can be revised and resubmitted.[216] Since local government often reacts inconsistently, initial action on development proposals seldom reliably predicts future responses.[217] The result is a developer under siege.[218] The exhaustion requirement "leaves the landowner vulnerable to a bewildering series of multiple-agency restrictions, buck-passing and dilatory vacillation".[219] *Prince George's County v. Blumberg*[220] is a classic ex-

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Hagman, *supra* note 205, at 134.

210. Moore v. East Cleveland, 431 U.S. 494, 522 (1977); Prince George's County v. Blumberg, 288 Md. 275, 284, 418 A.2d 1155, 1160-61 (1980).

211. *Moore*, 431 U.S. at 524; *Prince George's*, 288 Md. at 284, 418 A.2d at 1160.

212. *Moore*, 431 U.S. at 525; *Prince George's*, 288 Md. at 284, 418 A.2d at 1160-61. *See generally supra* note 206.

213. *Moore*, 431 U.S. at 525, 526.

214. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

215. Hagman, *supra* note 205, at 134; Comment, *supra* note 83, at 733. *See* MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2571 (1986) (regulatory decisions are an ongoing process).

216. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).

217. *See* Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108, 3117-18 (1985). Although the developer's project was unable to meet ordinance requirements in at least eight areas, no matter what plan was submitted, the Court felt the owner should have sought variances which would have resolved at least five of the objections. Unresolved, of course, was whether any plan would be approved if the remaining three objections were not removed.

218. Berger and Kanner, *supra* note 26, at 697. The authors compare a developer to a wagon train headed West at which desperados and Indians take potshots with impunity.

219. Comment, *supra* note 83, at 733; *see also* MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986) (property owner was entangled in a multi-agency web woven by the City of Davis and Yolo County), and Prince George's County v.

ample. Days before the plaintiff began construction on a high rise, he learned that the County intended to revoke his building permit. A law passed after its issuance required that he have a contractor's license.[221] Plaintiff applied for a license but began construction while its issuance was pending since he had to have footings in within six months in order to maintain his sewer permit.[222] Because he had no license, the County issued a stop notice. It also advised the sewer district that the building permit had been revoked. Predictably, the sewer district withdrew the sewer permit. The County then advised the owner it would not reissue a building permit until the sewer permit was reinstated.[223] The County Board of Appeals had jurisdiction over the building permit,[224] but none over the sewer permit. The owner charged that his administrative remedies were inadequate, and sued for injunctive relief.[225] The court denied relief,[226] and held that he was required to separately exhaust the remedies of each agency.[227]

There are some exceptions to the exhaustion requirement. Exhaustion of legislative remedies is not required.[228] An owner need not exhaust his remedies if a governmental body lacks authority to grant relief, if relief would be inadequate, if the administrative body has demonstrated hostility and the owner's petition would be futile or if irreparable harm would occur during the delay.[229] Requiring a landowner to run the gauntlet of repeated applications and denials in order to pinpoint local government's definitive position is not always necessary.[230] Govern-

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Blumberg, 288 Md. 275, 418 A.2d 1155 (1980).

220. 288 Md. 275, 418 A.2d 1155 (1980).

221. *Id.* at 279, 418 A.2d at 1158.

222. *Id.*

223. *Id.*

224. *Id.* at 289, 418 A.2d at 1163.

225. *Id.* at 281-82, 418 A.2d at 1159.

226. *Id.* at 292-94, 418 A.2d at 1165.

227. *Id.*

228. Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 IND. L.J. 45, 57 (1982); *see also* Euclid v. Ambler, 272 U.S. 365, 386 (1926).

229. *See* Kmiec, *supra* note 228, at 58; *see generally* Comment, *Exhausting Administrative and Legislative Remedies in Zoning Cases*, 48 TULANE L. REV. 665, 667-73 (1974), and City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 137, 610 P.2d 436, 444, 164 Cal. Rptr. 539, 547 (1980).

230. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2571 (1986).

ment's position can be determined by analyzing factors other than its actual decision on a given application.[231]

There should also be an exception to the exhaustion requirement when unfair state procedural rules regarding exhaustion violate the Supremacy Clause.[232] State courts decide, based on state procedural rules, whether an owner has exhausted his administrative remedies. Because a federal taking claim cannot arise unless such remedies have been exhausted,[233] state courts are frequently the arbiters of whether the taking issue is "ripe" or justiciable. However, whether a federal question exists is a matter to be determined by federal, not state, courts,[234] since preclusion of federal review on state procedural grounds jeopardizes important federal rights.[235] A state's determination that administrative procedures have not been exhausted should not preclude review of the taking issue, a federal question, unless the federal courts find state procedural rules fair.[236]

Although a landowner's taking claim is not premature if it is clear that the local government will not revoke an unconstitutional regulation,[237] it is dangerous for a landowner to unilaterally decide that seeking relief would be futile. The courts may well determine, in the exercise of judicial hindsight, that it is not at all clear that such a petition would have been futile.[238] This

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231. *Id.*

232. Article VI of the United States Constitution provides: "This Constitution . . . shall be the supreme Law of the Land . . . any Thing . . . in the Laws of any State to the Contrary notwithstanding."

233. Exhaustion of administrative remedies is an essential legal element of a taking claim. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2566 (1986); Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108, 3117 (1985).

234. L. TRIBE, *supra* note 162, §3-33, at 123 (1978).

235. *Id.*

236. The Supreme Court is generally zealous in scrutinizing state court procedures for fairness. *See* McDonald v. City of West Branch, 466 U.S. 284 (1984); Kremer v. Chemical Construction Corp., 456 U.S. 461, 481 (1982); Allen v. McCurry, 449 U.S. 90 (1980).

237. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 137, 610 P.2d 436, 444, 164 Cal. Rptr. 539, 547 (1980). *See also* Moore v. East Cleveland, 431 U.S. 494 (1977). In *Moore*, the plaintiff attacked an ordinance which permitted only immediate blood relatives to occupy a residential dwelling, and which prohibited her grandsons from living with her. The Court held Cleveland's variance procedure irrelevant since the ordinance was facially unconstitutional on due process grounds (abridging the right of related family members was outside the scope of a legitimate exercise of the police power) and because there was no basis for inferring that the plaintiff would have gotten the variance. *Id.* at 511-12.

238. *See* MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986);

risk can be eliminated without forcing the owner to jump through endless regulatory hoops. A solution was suggested in *Hernandez v. Lafayette.*[239]

In *Hernandez*, the City of Lafayette refused to rezone the plaintiff's property from single family to multiple density or office. The plaintiff charged that the City refused in order to depress land values pending an eminent domain proceeding designed to take part of the land for a road.[240] The Fifth Circuit Court held that a regulatory taking did not occur until the municipality's governing body was given a "realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity".[241] In a footnote, the court alluded to a procedure that could be utilized to give the city that opportunity—an owner's petition for rezoning.[242] The idea has been endorsed by legal scholars.[243] Regulated by state statutes, it would resolve the question of whether seeking further administrative remedies would be futile. Government's non-response to the petition could be deemed a final administrative decision and an expression of intent to take.[244]

The petition procedure would also resolve some of the separation of power and fiscal objections to the concept of regulatory takings. In *Ventures in Property Investment Company v. City of Wichita,*[245] a property owner obtained tentative approval of a plat map. Permanent approval was withheld until the City of Wichita decided on the location of a highway corridor. After waiting for the determination for four years, the plaintiff sued.[246]

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see also Zoning, AMERICAN LAWYER, 112 (1986), a comment on the *MacDonald* case, describing Howard Ellman's assertion, in oral argument before the Supreme Court, that application for review of a less intensive subdivision plan would have been "futile". The assertion was rejected by a majority of the Court, and turned out to be the fatal weakness in the case. *See also* Prince George's County v. Blumberg, 288 Md. 275, 418 A.2d 1155 (1980).

239. 643 F.2d 1188 (5th Cir. 1981).

240. *Id.* at 1191.

241. *Id.* at 1200.

242. *Id.* at 1200 n.27.

243. Hagman, *supra* note 205, at 134-35. Hagman feels that even a formal letter should be sufficient. *Id.* at 134. *See also* Kmiec, *supra* note 228, at 61-63.

244. Hagman, *supra* note 205, at 134.

245. 225 Kan. 698, 594 P.2d 671 (1979).

246. *Id.* at 699-701, 594 P.2d at 675.

The trial court found that the City had effected a taking.[247] The higher court reversed and ordered the City to approve the plaintiff's final map or condemn his property within six months. Failing either, judgment would be entered against the City, which would be liable for damages.[248] This amount of direct involvement by the courts in legislative affairs makes them "superzoning commissions",[249] involved in both land use and appropriations decisions. The petition procedure would reduce the courts' impact on both. Government, on receipt of the petition, is given notice that it has taken. Unless it chooses to contest, it can then rescind, modify or compensate. The courts are not involved. The matter remains in the administrative arena.[250]

The objection that local governments often "take" unwittingly would be irrelevant. For example, the owner in *Hernandez* could have delivered a petition to the Lafayette City Council, advising it that he considered the Council's refusal to rezone a regulatory taking. Lack of response within a statutorily defined period would have been deemed, at law, to constitute a final administrative decision. The owner would not be required to exhaust further administrative remedies before seeking judicial review.

The petition procedure presents some problems. The landowner, rather than the courts, becomes the initial arbiter of a taking. If he decides his land has been taken and petitions for a rezoning, he may intimidate local government into administrative relief to which he is not entitled. The extent to which the petition procedure intimidates decisionmaking will depend on local government's willingness to "stonewall it", and force the owner into the courts. Overall, the petition will help determine whether there has been a per se exhaustion of remedies and will also eliminate one of the greatest escape hatches through which the federal courts retreat to avoid finding a taking.[251]

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247. *Id.*

248. *Id.* at 714, 594 P.2d at 683.

249. Johnson, *supra* note 130, at 601. Johnson notes that federal courts, at least, are traditionally reluctant to act as super-zoning commissions.

250. Hagman, *supra* note 205, at 134. Hagman feels that formal suit should not be necessary.

251. *See generally supra*, note 171. The other major escape hatch appears to be abstention. *See* Berger and Kanner, *supra* note 26, at 694-95.

III. INVALIDATION ALONE IS AN INSUFFICIENT REMEDY

Bare invalidation of an oppressive regulation is not a sufficient remedy.[252] Invalidation prevents future loss of use, but it does not compensate a landowner for losses sustained during the lifetime of the regulation.[253] Because it is almost impossible to invalidate a course of conduct,[254] it places him on a regulatory merry-go-round,[255] and encourages planners to throw the burdens of progress on a few individuals:[256] invalidation of a regulation is "inexpensive" compared to the just compensation required in eminent domain. Such uneven distribution of regulatory burdens is contrary to the spirit of the Fifth Amendment, which restrains government from forcing individuals to bear burdens which should be borne by the public.[257] Invalidation is a due process remedy. Since a regulation can effect a taking without violating due process standards, injunctive relief may not always be available.

Prior to *Pennsylvania Coal*,[258] invalidation was the only remedy available for excessive regulation. Some state courts continue to apply it exclusively in land use cases.[259] A few legal scholars maintain that invalidation should be the exclusive remedy on a public policy basis: they argue that the importance of the public interest in land use cases justifies "asymmetrical

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252. *See generally* Berger and Kanner, *supra* note 26, at 731-38, and Corrigan v. City of Scottsdale, No. 18239-PR, slip op. at 11, 12 (Ariz., June 2, 1986): "Without a damages remedy, invalidation alone is a toothless tiger."

253. Hagman, *supra* note 205, at 130; Berger and Kanner, *supra* note 26, at 732.

254. Berger and Kanner, *supra* note 26, at 737.

255. Comment, *supra* note 83, at 733. *See also* Justice Brennan's footnote in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1980), reciting the jaded comments of a city attorney, and Berger and Kanner, *supra* note 26, at 734: "[T]he supposedly victorious owner, who has succeeded in having a court invalidate an unconstitutional regulation, finds that his reward is an invitation to become a yo-yo."

256. Burrows v. City of Keene, 121 N.H. 590, 599, 432 A.2d 15, 20 (1981).

257. *San Diego Gas*, 450 U.S. at 656 (Brennan, J., dissenting). *See also* Sax, *supra* note 74, at 55-58, which discusses the purpose of the fifth amendment as being protection of the individual from arbitrary and tyrannical acts of government. Under this view of the fifth, the amendment was intended as a bulwark against governmental unfairness, not against diminution of value. *Accord* L. TRIBE, *supra* note 162, §9-4, at 463 (1978).

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

259. Agins v. Tiburon, 24 Cal. 3d 266, 272-73, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979); Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, 386-87 (1976).

remedies".[260] Others insist that invalidation relieves any financial detriment to the owner.[261]

The judicial trend at the federal and state level is to acknowledge that invalidation alone is not an adequate remedy.[262] There is recognition of the fact that invalidation does not compensate the owner for his full economic loss.[263] At the federal level, dissents in two major cases appear to agree that states cannot limit a landowner's remedies to injunctive or declaratory relief.[264] They insist that rescission of a regulation does not remove the taking.[265] Justice Brennan stated in *San Diego Gas & Electric Company v. City of San Diego* that the Just Compensation Clause is not "precatory" and the Fifth Amendment provision regarding just compensation "self-executing".[266] Justice

260. Mandelker, *supra* note 203, at 498. Mandelker argues that the normal remedial hierarchy should be skewed in land use cases: the normal preference for damages which awards injunctive relief only if damages are inadequate is not operative in such cases. *Id.* at 491-92. He feels this asymmetry is due to the importance of the public interest at stake, and refers to the airplane overflight cases as examples of the courts' tolerance of asymmetry in regulation cases: the overflight cases award only legal, not equitable, relief. *Id.* at 497, 504.

261. Johnson, *supra* note 130, at 595. Johnson argues that after invalidation, the economic impact of the regulation is typically small in relation to the total value of the land, and that the magnitude of the loss is therefore not sufficient to constitute a taking. *Id.* at 595. She also argues that it is unfair to compensate a landowner burdened by an unconstitutional regulation but not to compensate one who is burdened by a constitutional one, as in the case of development moratoriums imposed while regulations are adopted. *Id.* at 595. For a good response to her insistence that invalidation removes most of the economic harm, *see* Comment, *supra* note 83, at 740-45, and especially the author's analysis of Prince George's County v. Blumberg, 228 Md. 275, 418 A.2d 1155 (1980).

262. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981), (Brennan, J., dissenting). *See* Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108, 3124-25 (1985), (Brennan, J., concurring); Burrows v. City of Keene, 121 N.H. 590, 599-600, 432 A.2d 15, 20 (1981); Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir. 1980).

263. *Williamson*, 105 S. Ct. at 3124-25; *San Diego Gas*, 450 U.S. at 655 (Brennan, J., dissenting).

264. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2574 (1986) (White, J., dissenting); *San Diego Gas*, 450 U.S. at 653-57, (Brennan, J., dissenting). *But see* the majority opinion in Agins v. City of Tiburon, 447 U.S. 255 (1980), which declined to consider whether a state could limit the remedies available to a person whose land had been taken without just compensation. *Id.* at 263.

265. *MacDonald*, 106 S. Ct. at 2574 (White, J., dissenting); *San Diego Gas*, 450 U.S. at 657, (Brennan, J., dissenting). Justice Brennan argues that "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory." *Id.* at 657.

266. *San Diego Gas*, 450 U.S. at 654, (Brennan, J. dissenting). *See also* 6 NICHOLS,

White declared in *MacDonald, Sommer & Frates v. County of Yolo*[267] that rescission of a regulation does not reverse a taking, and that the Constitution requires that just compensation be paid for a temporary taking.[268] Furthermore, if the police power and the power of eminent domain are coterminus,[269] a regulation which promotes a legitimate police power objective is entitled to the same judicial deference as an exercise of eminent domain.[270] The scope of review of public purpose is "extremely narrow".[271] It seems anomalous to allow a legislature to insist on deference in order to sustain a regulation and yet allow it to suddenly claim the regulation should be invalidated if the courts find a taking.[272] The Supreme Court barred such self-serving gamesmanship in eminent domain cases, holding in *Ruckelshaus v. Monsanto Company*[273] that "[e]quitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, where a suit for compensation can be brought against the sovereign subsequent to the taking."[274] Since eminent domain and the police power are coterminus, government should not be able to play switch and bait games with equitable remedies in regulatory taking cases.

Whether, in a given situation, government has the right to regulate and whether such regulation takes property are separate issues.[275] A regulation may survive due process scrutiny but still effect a taking for which compensation is required.[276] In *Eldridge v. City of Palo Alto*,[277] the property owner sued for a

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supra note 1, §25.41, and United States v. Clarke, 445 U.S. 253, 257 (1980).

267. 106 S. Ct. 2561 (1986).

268. *Id.* at 2574 (White, J., dissenting).

269. Hawaii Hous. Auth. v. Midkiff, 476 U.S. 229, 240 (1984).

270. Berger and Kanner, *supra* note 26, at 705-06.

271. Berman v. Parker, 438 U.S. 26, 32 (1954). *Accord Hawaii Hous. Auth.*, 467 U.S. at 240-41.

272. Berger and Kanner, *supra* note 26, at 706.

273. 467 U.S. 986 (1984).

274. *Id.* at 1016.

275. Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979). *Accord* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982); United States v. Security Indus. Bank, 459 U.S. 70, 74 (1982). *See generally* Berger and Kanner, *supra* note 26, at 728-31.

276. Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 621, 129 Cal. Rptr. 575 (1976), *vacated* 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979). *See also* Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 ARK. L. REV. 612, 619 (1984). *See generally supra* note 275.

277. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), *vacated* 24 Cal. 3d 266, 273, 598

taking on the basis of an open space ordinance he conceded was valid.[278] The California Court of Appeals agreed that the ordinance did not violate due process standards, but held that its validity did not immunize it from a taking challenge.[279] Since there is no necessary relationship between an ordinance's validity under a Fourteenth Amendment due process test and its constitutionality under a Fifth Amendment taking test, insisting on invalidation, a due process remedy, as the only remedy for an excessive regulation[280] is wholly without merit.

IV. CALCULATION OF JUST COMPENSATION FOR THE REGULATORY TAKING IS POSSIBLE

Assuming the payment of compensation is not precatory but mandatory,[281] a major problem remains: calculating that compensation.[282] The principles used for calculating just compensation in eminent domain cases provide a basis for its calculation in regulatory cases. However, the formula should reflect the temporary nature of the regulatory taking, and the fact that an owner is not entitled to all possible uses of his property. In addition, the regulatory formula should minimize the balance of power problems inherent in court-ordered compensation for legislative acts.

A. The Eminent Domain Standard

In eminent domain cases, the government is required to pay the landowner the full fair market value of the interest taken.[283] In order to be "just" for purposes of the Fifth Amendment, such

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P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979).

278. *Id.* at 617, 621, 129 Cal. Rptr. at 577, 579.

279. *Id.* at 632, 129 Cal. Rptr. at 586.

280. Agins v. Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979).

281. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting). *See* Bauman, *supra* note 26, at 95 for an explanation of Justice Brennan's "non-precatory" language.

282. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2574 (1986); Hagman, *supra* note 56, at 6.

283. 4 Nichols, *supra* note 1, §12.1. Fair market value is "the price agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy." Uniform Eminent Domain Code §1004(a), 13 ULA 104 (1980).

compensation should be the full and perfect equivalent in money of the property taken.[284] An owner is to be placed in as good a position, pecuniarily, as he would have been in had the property not been taken.[285] The fair market standard is geared to compensating the owner not just for the existing use, but for its best and highest use under existing zoning.[286] If only part of an owner's land is taken, and the partial taking reduces the value of the remaining property, an owner is entitled to compensation for the diminished value.[287] If the value of his remaining land is enhanced by the condemnation, the government is allowed to deduct that from his award.[288]

An eminent domain award is based on the value of property alone. It does not take the individual circumstances of the owner or the state of his business into consideration.[289] While all the other clauses in the Fifth Amendment are personal, the Just Compensation Clause is not: its emphasis is on property alone.[290] As a result, special idiosyncratic value and consequential damages are usually ignored in calculating just compensation.[291]

The market standard may not be used when it is too difficult to ascertain value. Another standard may be adopted if the use of market value would be unjust to the owner or to the public.[292] Deviation from the market standard requires unusual circumstances such as a controlled market.[293]

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284. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

285. United States v. Miller, 317 U.S. 369, 373 (1943).

286. L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN (1936); *see* Costonis, *supra* note 23, at 1042-45, for a critique of the best and highest use standard.

287. Bauman v. Ross, 167 U.S. 548, 574 (1897); *see also infra* note 278.

288. *Bauman*, 167 U.S. 548.

289. *Id.* at 580.

290. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

291. United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945); United States v. Miller, 317 U.S. 369 (1943). *See also infra* note 323.

292. United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950). This case involved a government requisition of black pepper in a controlled World War II market. The plaintiff asked for a fair market price which the court rejected, saying that fair market value was not always an appropriate standard, and was clearly inappropriate in a controlled market. *Id.* at 122-23, 130.

293. *Id.* In the *Commodities Trading* case, the Office of Price Administration had established a ceiling price on pepper. The plaintiff sought an uncontrolled fair market value for its pepper, but the court held the ceiling price was the proper measure of just compensation. *Id.* at 130.

B. APPLYING THE EMINENT DOMAIN STANDARD TO REGULATORY TAKINGS

Justice Brennan agreed in *San Diego Gas* that eminent domain standards of just compensation were adequate in regulatory cases.[294] There are reasons to object to their use. Condemnation results in the permanent transfer of the fee; regulations do not.[295] Regulations seldom have any permanent effect.[296] Zoning decisions may distribute use rights unevenly,[297] but property owners do not have vested rights in any given zoning.[298] Strictly applying the eminent domain standard for just compensation would require local government to pay for a use it created. For example, in the *MacDonald* case,[299] Yolo County zoned the plaintiff's land for residential use,[300] then later decided it was appropriate only for agricultural use.[301] If the County had condemned the land instead of downzoning it, it would have had to compensate the owner for the best and highest use of the land under the residential zoning. The reduction of use from residential to agricultural was not, in and of itself, a taking. The owner was not entitled to residential use, only to some beneficial use. The taking occurred because no use was possible under the agricultural designation. An award of compensation based on the residential zoning would have been a windfall to the owner.

Eminent domain compensation standards can be adapted to regulatory taking cases. Such adaptations should discriminate between permanent and temporary takings and between reduction versus deprivation of use.

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294. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658-59 (1981) (Brennan, J., dissenting).

295. Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). *See* Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938), which noted that an oppressive regulation left the owner with little more than the obligation to pay taxes.

296. Golden v. Planning Bd., 30 N.Y. 2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).

297. Costonis, *supra* note 23, at 1027.

298. Johnson, *supra* note 130, at 566.

299. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986).

300. Appellant's Brief at 4, MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986) (No. 84-2015).

301. *Id.* at 7.

1. *Permanent versus interim damages*

If a regulation permanently takes property, use of the eminent domain standard is appropriate. It is also appropriate where a court orders acquisition of land rather than invalidating an ordinance.[302] Where government refuses to recede from a regulation,[303] permanent damages are appropriate because there is a de facto condemnation. In most taking cases, an owner asks only for interim damages, or for interim damages and invalidation.[304] Permanent damages are seldom awarded when a regulation is rescinded.[305] They seem unwarranted in such cases,[306] unless temporary application of the regulation permanently destroys use or value.[307]

There is resistance to interim damages.[308] Such damages might chill the legislative function[309] by increasing the occasions on which government would be forced to pay for the right to regulate. Protecting the public welfare would be more expensive.

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302. Ventures in Property Inv. v. City of Wichita, 225 Kan. 695, 594 P.2d 671 (1979). The court ordered the City of Wichita to either approve plaintiff's development or to condemn the property, and gave it six months to decide. *Id.* at 714, 594 P.2d at 683. There are clear separation of power problems involved in such court orders, since the court becomes in effect a zoning commission. *Contrast* Sheerr v. Evesham Township, 184 N.J. Super. 11, 445 A.2d 46 (1982), where the court refused to order condemnation, holding such an order should be issued only where acquisition seemed inevitable. *Id.* at 61-62, 445 A.2d at 73. *See also* Arastra Ltd. Partnership v. City of Palo Alto, 401 F.Supp. 962 (N.D. Cal. 1972), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976): the court ordered the City of Palo Alto to pay for the value of the fee as of the date the open space regulation was passed and plaintiff was ordered to convey title on receipt of payment. *Id.* at 983.

303. *See* Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976). *Eldridge* was disapproved by the California Supreme Court in Agins v. Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979). In *Eldridge* the plaintiff conceded the validity of the open space ordinance. *Id.* at 617, 129 Cal. Rptr. at 577.

304. Johnson, *supra* note 130, at 590; *see* City of Austin v. Teague, 570 S.W.2d 389, 390 (Tex. 1978); *Agins*, 24 Cal. 3d at 271-72, 598 P.2d at 27, 157 Cal. Rptr. at 374.

305. *But see* Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969), where the court did award permanent damages despite rescission of the County's regulations.

306. Johnson, *supra* note 130 at 592.

307. Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977).

308. Hagman, *supra* note 205, at 130-32; Johnson, *supra* note 130, at 595.

309. Johnson, *supra* note 130, at 593-95. *But see* Hagman, *supra* note 205, at 133, who rejects the chill argument. Johnson feels that while interim damages exert less chill than permanent, they will still sway legislative bodies to vote in favor of developers. Johnson at 594. *See also* Michelman, *supra* note 101, at 1222; he feels that the award of temporary damages will force legislators to abandon worthwhile projects.

Damages must be certain,[310] and interim damages are difficult to prove.[311] Some argue that no damages exist in temporary takings at all.[312] No compensation is awarded, for example, when local government places a temporary moratorium on development in order to revise regulations or to prevent development from overwhelming public services.[313] Despite these considerations, there are strong indications that a majority of the Supreme Court Justices would require the payment of just compensation for temporary takings.[314]

There is precedent for interim damages in "pure" eminent domain cases involving short term condemnations. Such condemnations were frequent during World War II, and several cases dealing with valuation of temporary takings reached the Supreme Court.[315] In *United States v. General Motors Corporation*,[316] the federal government temporarily condemned a Chicago warehouse under the War Powers Act. The plaintiff retained the reversionary rights in a long term lease which the condemnation interrupted.[317] The Supreme Court held that the

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310. Kimball Laundry Co. v. United States, 338 U.S. 1, 20 (1948); Sheerr v. Evesham Township 184 N.J. Super. 11, 54, 65, 445 A.2d 46, 69, 75 (1982). *See* City of Austin v. Teague, 570 S.W.2d 389, 394-95 (Tex. 1978), where the owner was able to establish a taking but not allowed to recover compensation because he didn't prove loss with reasonable certainty.

311. Johnson, *supra* note 130, at 595-96.

312. Johnson, *supra* note 130, at 595.

313. Johnson, *supra* note 130, at 595. Development moratoriums imposed in order to allow a jurisdiction to adopt regulatory guidelines are usually upheld against both due process and taking challenges. *See, e.g.*, Golden v. Planning Bd., 30 N.Y. 2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972); *contrast* Construction Ind. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied* 424 U.S. 934 (1976).

314. Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981). In *San Diego Gas*, Justice Brennan's dissent was joined by three other Justices - Stewart, Marshall and Powell; Justice Rehnquist, who wrote a concurring opinion, agreed in principle with Justice Brennan, but felt no final judgment had been entered in the lower court. *Id.* at 633-34, 636. Justice Brennan reiterated his position in *Williamson*, and was joined by a sixth Justice, Justice White, in the *MacDonald* case. *See Williamson*, l05 S. Ct. at 3124-25, and MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2574 (1986) (White, J., dissenting). Two-thirds of the United States Supreme Court now find interim takings compensable. The retirement of Chief Justice Burger should not affect the Court's posture on this issue.

315. *See* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

316. 323 U.S. 373 (1945).

317. *Id.* at 375.

plaintiff could recover the value of the lease for the duration of the taking. It also allowed the recovery of limited consequential damages because the taking interrupted the plaintiff's tenancy.[318]

Despite a judicial trend which favors compensation for the temporary taking, the standards for valuing such compensation are far from clear.[319] As Justice Rehnquist noted in his concurrence in *MacDonald*,[320] "the questions surrounding what compensation, if any, is due a property owner in the context of 'interim' takings are multifaceted and difficult".[321] Justice Brennan declared in *San Diego Gas* that the reversible quality of a temporary taking makes just compensation no less obligatory.[322] State and lower federal courts have awarded interim damages before[323] and after[324] the *San Diego Gas* decision. However, there is no consensus on valuation criteria.

2. *Rejection of consequential damages*

The focus in eminent domain is not on making the owner whole, but on compensating him for his property loss.[325] It is not a tort to govern,[326] but some legal scholars feel that there is enough difference between eminent domain and regulation to justify including some consequential damages in the compensation formula for regulatory takings.[327]

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318. *Id.* at 378, 383.

319. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2574 (1986), (Rehnquist, J., dissenting); Hagman, *supra* note 56, at 6.

320. *MacDonald* 106 S. Ct. 2561 (1986).

321. *Id.* at 2574.

322. San Diego Gas. & Elec. Co. v. City of San Diego, 450 U.S. 621, 657 (1981), (Brennan, J., dissenting).

323. *See, e.g.*, Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709, 728-29 (D.N.J. 1976). The court, reviewing the granting of a motion to dismiss, only "discussed" the appropriateness of temporary damages in regulatory cases, based on the cases cited *supra* note 315.

324. Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983); Sheerr v. Evesham Township, 184 N.J. Super. 11, 445 A.2d 46 (1982).

325. Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949); United States v. General Motors Corp., 323 U.S. 373, 378 (1945); United States v. Miller, 317 U.S. 369, 373 (1943); Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

326. Hagman, *supra* note 205, at 133.

327. Wright, *supra* note 276, at 639; *General Motors*, 323 U.S. at 383.

Divergent attitudes toward the *purpose* of compensation produce a lack of consensus regarding recovery of non-property losses. Justice Brennan argued in *San Diego Gas* that compensation should redistribute the economic cost of regulation from the individual to the public at large.[328] Redistributive compensation would cover economic loss beyond mere property value.[329] The principal objection to this approach is that it redistributes only losses, not gains. Although an owner can be selectively favored by regulations, his gains are not redistributed. He is not required to pay the government back for his special advantages. Some feel that since an owner doesn't have to pay for regulatory advantages, government shouldn't have to pay him when he is disadvantaged.[330]

Others urge that compensation should be paid only if government is acting in an enterprise capacity, but not when it acts as an arbitrator, resolving conflicts between uses.[331] *Spur Industries, Inc. v. Del E. Webb Development Company*[332] is a classic "arbitral" case. In *Del Webb*, residential development encroached on a pre-existing stockyard. When residents complained about odors and health hazards, the City closed the stockyard, but forced the developer to compensate the stockyard

328. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 (1981), (Brennann, J., dissenting). The "redistribution of regulatory burden" theme is echoed in a number of cases. *See, e.g.*, PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

329. *See* Justice Brennan's comments in *San Diego Gas*, 450 U.S. at 657: "The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken." Justice Brennan contemplates damages beyond mere property value, since he cites United States v. General Motors Corp., 323 U.S. 373 (1945). *San Diego Gas* at 659. *General Motors* involved the government's condemnation of a long term lease. The Court noted that while market value was ordinarily the proper measure of compensation, it was sometimes an inappropriate measure. *Id.* at 379-80. It distinguished between the taking of a permanent fee and the taking of a temporary right to occupy and awarded consequential damages, arguing that bare market value would be "confiscation", not "compensation". *Id.* at 380-81.

330. Johnson, *supra* note 130, at 595.

331. Sax, *supra* note 74, at 62-75. *See also* Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 593, 385 N.Y.S.2d 5, 8, 350 N.E.2d 381, 384 (1976), where the court applied Sax' arbitral/enterprise distinction. Although Sax coined the phrase, the distinction grows out of the treatment of the police power in nuisance cases. Abatement of a nuisance - an "arbitral" act - is not a compensable taking. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915).

332. 108 Ariz. 178, 494 P.2d 700 (1972).

owner. In *Eldridge v. City of Palo Alto*,[333] the City of Palo Alto acted as a market participant, acquiring open space by regulation. The arbitral/enterprise distinction is based on writings completed before and during the drafting of the Fifth Amendment.[334] These writings emphasize the need to protect landowners against unfairness, not against value diminution.[335] However, since arbitral/enterprise theorists see property as economic value defined by the process of competition,[336] "activity" value as well as "land" value is compensable.

A third approach, the "fairness" approach, emphasizes "equalization" of the burdens of regulation.[337] Under the redistributive view, the individual's full regulatory losses are shifted back onto society.[338] Those who utilize a fairness analysis would shift only the excess increment of loss onto society.[339] As such, something less than an owner's full property or special losses might be due.

The choice of compensation goals — redistribution, protection or fairness — affects whether non-property losses are compensable in taking cases. Considerations of fairness to society may also affect the availability of consequentials. In an eminent

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333. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

334. Sax, *supra* note 74, at 57-58.

335. *Id.* at 53.

336. *Id.* at 61. Sax, apparently frustrated with the problems of defining "government enterprise" and trying to develop a basis for property value that ignored events outside the property's boundaries, later abandoned the arbitral/enterprise theory for an ecological view of property which admitted that property values and use were part of a social ecosystem. Since most uses had impacts beyond property boundaries, only those use impacts limited to the confines of given property were compensable if "taken" by regulation. It appears that Sax found most government regulation to be arbitral. *See* Sax, *supra* note 101, at 155-62.

337. *See* Michelman, *supra* note 101, and Costonis, *supra* note 23. Both Michelman and Costonis are concerned about capricious redistribution of wealth by government acts, but both reject full compensation (i.e., the market value standard). Costonis feels that compensation should reimburse an owner only for taking reasonable beneficial use, not best and highest use. Costonis at 1022-23. Michelman feels compensation should be paid only if settlement costs are greater than the efficiency gains and demoralization costs of the regulation, and would protect individual owners only from "concentrated" losses. Michelman at 1213, 1222.

338. *See, e.g.*, Ciamporcero, *'Fair' is Fair: Valuing the Regulatory Taking*, 15 U.C. DAVIS L. REV. 741, 754 (1982). *See* Blume and Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L.REV. 569, 615 (1984), for a discussion of zoning by Special Assessment Financed Eminent Domain Statutes in Minnesota.

339. Ciamporcero, *supra* note 338, at 756; Costonis, *supra* note 23, at 1050-52.

domain context, just compensation means compensation that is just to the public as well as the individual.[340] This may mean balancing public and private interests in arriving at just compensation. In a regulatory context, the sheer number of regulatory acts exposes the government to fiscal disaster.[341] The payment of compensation for regulatory acts may also inhibit local officials and present separation of power problems. In order to be just to the public, compensation for regulatory takings should be fair but should not be a windfall. As a result, most courts have adopted the eminent domain standard, which focuses on property value alone,[342] and which does not award consequential damages.[343] Only a few courts are willing to award damages that are not directly tied to property in regulatory taking cases.[344] Compensation in such cases should be calculated on the basis of the property interest taken, which is the right to beneficial use. Market forces compensate for consequential losses. Property value rebounds after the regulation effecting the taking is invalidated. As a result, there may be a net gain to the plaintiff whether or not development costs were expended. In *Cordeco Development Corporation v. Santiago Vasquez*,[345] the plaintiff

340. Chesapeake & Ohio Canal v. Key, 3 Cranch CC 599, 601 (1829), cited in Bauman v. Ross, 167 U.S. 548, 570 (1897). *See also* United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

341. Even though the fiscal disaster argument was rejected in Owen v. City of Independence, 445 U.S. 622 (1980), a non-taking case, local officials remain presumably less than enthusiastic about paying compensation in regulatory taking cases — especially in light of the current fiscal conservatism evidenced by such measures as California's infamous "Prop. 13" (Jarvis-Gann Proposition 13 Initiative, codified at Cal. Const. art. 13A, §§1-6). *See also* Johnson, *supra* note 130, at 563.

342. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). *See also* Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir. 1981). The *Kimball* rationale upholds a strict property approach that reimbursement is due only for what is taken, and other consequentials are disallowed except as they go to prove property value.

343. United States v. Petty, 327 U.S. 372, 378 (1946). *Petty* also rejected valuation based on the value of property to the specific owner, holding that market value doesn't fluctuate with the needs of the condemnor or condemnee, but only with general market demand for property. *Id.* at 377.

344. *See* Prince George's County v. Blumberg, 288 Md. 275, 418 A.2d 1155 (1980), which awarded the developer interest on lost profits. However, Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709 (D.N.J. 1976), rejects the lost profits basis, holding that future profits are not compensable. *Id.* at 729. Sheerr v. Evesham Township, 184 N.J. Super. 11, 445 A.2d 46 (1982), also rejected lost profits as "too uncertain to permit proof". *Id.* at 65, 445 A.2d 75. This seems in line with the fact that invalidation eliminates future losses. *See* Johnson, *supra* note 130, at 595. *See* also Keystone Associates v. Moerdler, 19 N.Y. 2d 78, 278 N.Y.S.2d 185, 224 N.E.2d 700 (1966), which awarded carrying charges incurred during the period of the temporary taking.

345. 539 F.2d 256 (1st Cir. 1976).

tried to use lost profits to measure the compensation due. Conspiring with a wealthy landowner, government officials had used the permit process to prevent the plaintiff from extracting and marketing sand deposits on its land. The court refused to use the lost profits as the measure of damages because the sand had doubled in value.[346]

Rejecting consequential damages in constitutional taking cases is appropriate in light of the fact that tort damages are seldom awarded in taking cases brought under the Section 1983 civil rights statute.[347] In *Carey v. Piphus*,[348] a 1983 action, several male students were suspended without hearings for using marijuana and wearing earrings on campus. They were allowed to recover nominal damages without proof of loss on the theory that the right to procedural due process is absolute. The Supreme Court held that the right to damages flowed from the violation alone, even absent proof of injury.[349] However, the majority opinion noted that a tort rule of damages would not apply to every Section 1983 case.[350] The majority felt that compensation should be tailored to the interest protected.[351] A lower federal court subsequently rejected damages in a Section 1983 regulatory taking case. It held that they were discretionary, not mandatory, in Section 1983 taking cases, and found them inappropriate under the particular circumstances of the case.[352] In *Hernandez v. City of Lafayette*,[353] the Fifth Circuit Court of Appeals dealt with a 1983 action by deferring to eminent domain standards and focusing on property value. The Circuit Court held that an action for damages would lie under 1983 in favor of any person whose property was taken without just compensation, but that

346. *Id.* at 262.

347. 42 U.S.C. §1983 (1982). Section 1983 provides a damages remedy to a person claiming deprivation of a federal constitutional right by a person or entity acting under color of state law. Thus, an owner whose property has been taken by regulation can sue directly under the Constitution's fifth amendment for just compensation, or under Section 1983 for damages.

348. 435 U.S. 247 (1978).

349. *Id.* at 266-67.

350. *Id.* at 258.

351. *Id.* at 259.

352. Jacobson v. Tahoe Regional Planning Agency, 474 F. Supp. 901, 903 (D. Nev. 1979).

353. 643 F.2d 1188 (5th Cir. 1981).

the proper measure of damages in such an action was an amount equal to the value of the property for the period of the taking.[354]

3. *Rejection of the best and highest use standard*

In eminent domain, compensation is awarded on the basis of the best and highest use of the land under the existing zoning.[355] The eminent domain standard is not easily applied to regulatory takings.[356] An owner does not have a vested right to existing zoning,[357] and may not be able - or motivated - to put the property to its best and highest use.[358] It seems unreasonable to calculate compensation at the best and highest use of property when that use is not available to an owner. In *Usdin v. State Department of Environmental Protection*,[359] the court awarded the plaintiff only three years of compensation even though the offending regulation had been in effect for six years. It reduced the compensation because the plaintiff was not ready, willing and able to develop until halfway through the period of regulation.[360]

There is nothing constitutionally compelling about the best and highest use standard.[361] It is a judicially evolved doctrine[362] that developed in an era largely free of regulatory controls.[363] In a modern land use context where a significant portion of land value is created by government controls,[364] the best and highest

354. *Id.* at 1200.

355. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting). *See also* 6 NICHOLS, *supra* note 1, §25.41, and United States v. Clarke, 445 U.S. 253, 256 (1980).

356. Costonis, *supra* note 23, at 1042-45; Blume and Rubinfeld, *supra* note 338, at 618-23.

357. Hagman, *supra* note 205, at 133; Johnson, *supra* note 130, at 566.

358. *See* Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, Part 2, 4 ZONING AND PLAN. L. REPT. 137, 138 (1981); *see also* Usdin v. State Dept. of Environmental Protection, 173 N.J. Super 311, 414 A.2d 280 (1980), which reduced a taking from six to three years because the developer was unable to perform for half of the period of the alleged taking. *Id.* at 332, 414 A.2d at 290-91.

359. 173 N.J. Super. 311, 414 A.2d 280 (1980).

360. *Id.* at 332, 414 A.2d at 290-91.

361. Costonis, *supra* note 23, at 1042.

362. Costonis, *supra* note 23, at 1042. *See also* United States Commodities Trading Corp., 339 U.S. 121, 123 (1950).

363. Costonis, *supra* note 23, at 1042.

364. Costonis, *supra* note 23, at 1043-44; Johnson, *supra* note 130, at 595. *See also* Blume and Rubinfeld, *supra* note 338, at 618-20: they feel the availability of compensation will encourage speculation and drive fair market values up. However, the argument

use formula gives the owner an added increment of value.[365] The owner has no moral entitlement to such value, since he did nothing to create it.[366] The fact that not all land is available for all uses creates a large part of property value.[367]

The alternative to calculating compensation on the basis of best and highest use is to use a reasonable beneficial use standard. Professor John J. Costonis recommended basing regulatory just compensation on reasonable beneficial use.[368] Although he failed to clarify what constituted reasonable beneficial use,[369] the definition can be extracted. In *Penn Central*, the Supreme Court focused on whether there were any remaining permitted uses in evaluating whether a taking had occurred.[370] The majority equated permitted uses with productive uses.[371] Therefore, it appears that a remaining permitted use and a reasonable beneficial use are essentially the same thing. If no permitted uses remain, a taking has occurred and compensation should be measured by the difference between the land's value as regulated and its value with the minimal permitted use which would remove the taking.[372]

C. Additional Innovations

Rejecting consequential damages and the best and highest

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that zoning's impact on value is significant was rejected by Kmiec, *supra* note 228. He felt that zoning's impact on value was exaggerated, and that topography, available municipal services and transporation and the present and future uses of adjacent land were equally important. *Id.* at 70-71.

365. Costonis, *supra* note 23, at 1042-45.

366. Kmiec, *supra* note 228, at 71. *See also* Costonis, *supra* note 23, citing Bernard Siegan's quote from Mason Gaffney: "When the planning commission and the zoning board flit about sprinkling little golden showers here rather than there, they make millionaires of some and social reformers of others." *Id.* at 1027.

367. For an alternate point of view, *see supra* note 364.

368. Costonis, *supra* note 23, at 1049-55.

369. Costonis, *supra* note 23, at 1052. *See also* Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 Columb. L. Rev. 799 (1976). Costonis discusses five use categories falling between highest and best use and zero intensity use. A regulation which restricts use below reasonable beneficial use would be a taking and compensable, as measured by the difference of the land value measured at reasonable beneficial use and the permitted use which effects the taking. Costonis, *supra* note 23, at 1060.

370. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136, 137 (1978).

371. *Id.* at 136.

372. Ciamporcero, *supra* note 338, at 756; Costonis, *supra* note 23, at 1051-52.

use standard partially resolves the calculation of just compensation in a regulatory context. Three issues remain: calculation of the duration of the taking, determination of the rate of payment, and development of a procedure for determining the level of use which will remove the taking. Alternatives to cash compensation should be explored in order to minimize the financial impact on local government.

1. *The duration of the regulatory taking*

Justice Brennan made it clear that just compensation for a regulatory taking should be calculated "for the period commencing on the date the regulation first effected the 'taking', and ending on the date the government entity chooses to rescind or otherwise amend the regulation".[373] Modifications to Justice Brennan's standard have been suggested,[374] but it has already been adapted in state cases awarding interim damages.[375]

2. *Determination of the rate of compensation*

Compensation can be based on rental rates,[376] or the fair

373. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting).

374. *See* Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981). *Hernandez* suggests that the taking does not occur until "the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity." *Id.* at 1100. The *Hernandez* court ruled that fluctuations in value during such review proceedings were not compensable absent extraordinary delays, since they were incidents of ownership. *Id.* at 1201. This appears reasonable in view of consistent court holdings that moratoriums imposed to allow regulations to be adopted do not effect compensable takings. *See supra* note 313. The *Hernandez* view was endorsed by Donald G. Hagman in *Temporary or Interim Damages Awards in Land Use Control Cases*, *supra* note 205. Hagman seems to suggest the taking would be deemed to occur after notification to the government plus a not unreasonable time. *Id.* at 135. In Part 2 of his article, Hagman suggests application of the so-called severance rule, under which compensation would be based on the value immediately before and immediately after the taking in order to give the market time to react. *See supra* note 358. Hagman also suggests the taking should be reduced by the period of the developer's inability to perform, based on Usdin v. State Dept. of Environmental Protection, 173 N.J. Super. 311, 414 A.2d 280 (1980), which reduced the length of an interim taking from six to three years. *Id.* at 332, 414 A.2d at 290-91.

375. *See supra* note 324.

376. United States v. General Motors Corp., 323 U.S. 373 (1945); Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709 (D.N.J. 1976); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). *See also* Hagman, *supra* note 358, at 138-40. *See Usdin*, 173 N.J. Super. 311, 318-19, 414 A.2d 280, 284 for an example of a generous rental

market value of an easement[377] or option.[378] The rental, easement or option value should be based not on the land's value under the oppressive regulation, but on its value with the reasonable beneficial use which would remove the taking. Because most land involved in regulatory takings is undeveloped, the option selected would probably not greatly affect the total compensation paid.[379] The landowner will bear the burden of proof regarding the amount of compensation due. This burden will be an obstacle to recovery. In *City of Austin v. Teague*,[380] for example, the court used a rental basis for calculation of just compensation. It held that the rule of certainty applied to rental losses and found that anticipated rentals from undeveloped land were inherently uncertain.[381] Since the plaintiff's land had never been rented, there was no track record. Furthermore, the plaintiff had no specific development plans, which would have helped establish value. Therefore, even though the plaintiff established its right to compensation, none was awarded.[382] The plaintiff simply failed to prove that the land would have produced any return.[383]

3. *Determination of the level of use*

The process of determining the reasonable beneficial use might involve a separation of powers problem. Some courts have mandated a specific use,[384] which places the court in the position

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formula. Hagman feels that the rental compensation ordered in *Usdin* ($42,301.96 for three and one-half years) would probably chill, but adds "Perhaps the state should have been chilled." Hagman, *supra* note 358, at 139.

377. Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976). *See also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting). Justice Brennan seems to characterize the interest taken as an easement.

378. Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 113-14, 237 A.2d 881, 884 (1968).

379. Hagman, *supra* note 358, at 140.

380. 570 S.W.2d 389 (Tex. 1978).

381. *Id.* at 395.

382. *Id.* at 394.

383. *Id.* at 395.

384. *See* Cosmopolitan Bank v. Village of Niles, Circuit Court of Cook County, (80 L 17355, Jan. 30, 1984), cited in Smith, *Inverse Condemnation as a Remedy: Its Limitations and Alternatives*, 107, 125 A.L.I.-A.B.A. COURSE OF STUDY, (The Compensation Issue, Theories of Liability for Damages from Planning and Land Use Controls) (1984). In the *Niles* case, the Circuit Court invalidated the Zoning Board of Appeals and Planning Commission's denial of a use permit for a McDonald's restaurant and specifically permitted the use. *See also* Pa. Stat. Ann. Title 53, §11011(2) (Purdon's Supp., 1980) which

of a superior zoning or planning commission. In one case, a district court directed the jury to determine the level at which the property would probably have been allowed to develop and to base compensation on that determination.[385] This substitutes the jury's opinion for that of locally elected representatives. Other courts have invalidated a regulation but remanded to the legislature for adoption of new regulations.[386]

Justice Brennan approved the concept in *San Diego Gas*.[387] Court involvement might be avoided completely by combining legislative remand with the *Hernandez*-Hagman notice idea. If a city were given, for example, six months to remove the taking, it could issue a Certificate of Alternate Use within that period. The Certificate would indicate which use or uses local government would permit in order to relieve the claimed taking.[388] If an owner were satisfied with the response, litigation could be avoided. If an owner has already sued, the court would retain jurisdiction and monitor government's responses. The parties could also consent to non-binding arbitration.

Once the owner or the court accepts government's response as removing the taking, damages can be calculated from the date the regulation was adopted to the date it was rescinded. Value would be based on the negotiated or adjudicated use rights in the land. Once time frame and use level issues are resolved, ordinary eminent domain compensation principles can be used to calculate the owner's damages.[389]

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allows a court to order site specific relief when an owner demonstrates that zoning restrictions are invalid as applied to his property. This allows site specific relief only, not rezoning, per Ellick v. Board of Supervisors of Worcester Township, 17 Pa. Commw. 404, 333 A.2d 239 (1975).

385. Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962, 982 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976).

386. Smith, *supra* note 384, at 121. *See also* Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir. 1981), which approved such remand.

387. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 660-61 (1981) (Brennan, J., dissenting).

388. Hagman, *supra* note 205, at 135.

389. *San Diego Gas*, 450 U.S. at 658-59 (Brennan, J., dissenting). Justice Brennan does raise the specter that some consequentials may be recoverable. Discussing cancellation of eminent domain proceedings as precedent for the temporary regulatory taking where invalidation occurs, he argues that in both cases, the "cancellation" merely changes the property interest taken from full ownership to temporary use and occupation. He then adds "In such cases, compensation would be measured by the principles normally governing the taking of a right to use property temporarily." *Id.* at 658. Those

Basing compensation on land use *before* the regulation may be an alternative to using negotiated use levels. Justice Brennan hinted at this possibility in *San Diego Gas.*[390] Such an approach might result in unfairness. In *Just v. Marinette County*,[391] for example, land was in a natural, undeveloped state before being regulated,[392] so the court found that no existing use was taken.[393] The fact that an owner has not used land in the past should not estop his future use.

On remand, the states should be free to experiment with compensation procedures.[394] The Constitution sets forth only the general principle of just compensation.[395] In eminent domain, the means of ascertaining that compensation are left to the public authorities.[396] Florida, for example, already has a statute, modeled on the American Land Institute Model Land Development Code, which provides for repeal or monetary damages as alternative remedies in regulatory cases.[397] Minnesota utilized a unique statutory rezoning procedure in the 1960's. It authorized the establishment of residential districts if fifty percent of the property owners in the district petitioned for the change.[398] The scheme authorized condemnation of property in certain excluded classes when a district was rezoned, and contained provisions for the appraisal, valuation and payment of

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principles were set out in cases like United States v. General Motors, 323 U.S. 373, 383 (1945), which awarded consequentials including moving and storage costs and payment for destroyed fixtures. *See also* Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 114, 237 A.2d 881, 884 (1968), which approved reimbursing plaintiff for engineering costs related to plot approval and for property taxes for the period of the taking. Arguably, these consequential cases would not apply to many regulatory takings which involve bare land and do not interrupt businesses.

390. *San Diego Gas*, 450 U.S. at 659.

391. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

392. *Id.* at 23, 201 N.W.2d at 770-71.

393. *Id.*

394. *San Diego Gas*, 450 U.S. at 660 (1981) (Brennan, J., dissenting). The only restrictions Justice Brennan would place on such procedures are that they "comport with the fundamental constitutional command", i.e., allow an owner a meaningful opportunity to challenge a regulation that allegedly effects a taking and recover just compensation if it does so, without being forced to resort to piecemeal litigation or unfair procedures. *Id.*

395. Bauman v. Ross, 167 U.S. 548, 574 (1897); *San Diego Gas*, 450 U.S. at 660 (Brennan, J., dissenting).

396. *Id.*

397. *See* Fla. Stat. Ann., §380.085 (West Supp., 1986).

398. Minn. Stat. Ann., §§462.11 and 462.12 (West, 1963). Section 462.11 was repealed in 1965.

damages.[399] The existing eminent domain procedures, which empanel a separate jury to determine property value, are also workable in a regulatory context, and have, in fact, already been used.[400]

Legislative remand gives government the opportunity to rescind and pay or to maintain the regulation in force permanently or for an unspecified period.[401] Regulatory flexibility is maximized and the government is not forced to pay for a fee interest every time a regulation is determined to "take". On remand, government can balance the value of the regulation against its financial cost. Separation of power problems are minimized because the decision to invalidate or compensate rests with the legislature.[402] Not incidentally, the quality of regulation is improved, because government is forced to look at all the impacts of regulation, not just the benefits it hopes to obtain without paying. The continuing jurisdiction of the courts preserves the property owner's protections.

4. *The temporary taking alternative*

Local government may find the temporary taking an attractive alternative to eminent domain proceedings. Since land use patterns change, a city's goals may often be accomplished by short-term prohibitory regulation. A city may, for example, wish to slow growth, not stop it.[403] A prospective taking of five or ten years may allow it to accomplish such goal. The compensation due for a regulatory taking should be less than in eminent domain since local government would pay only the easement/option/rental value of the land for the period of regulation, not for the fee.

There are necessarily limits on prospective takings. The

399. Minn. Stat. Ann., §§462.13 and 462.14 (West Supp., 1987).

400. Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962, 982 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976).

401. *See* Kmiec, *supra* note 228, at 62-63; San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 659-60 (1981) (Brennan, J., dissenting) ("Alternatively, the government may choose formally to condemn the property, or otherwise to continue the offending regulation . . . .").

402. *San Diego Gas*, 450 U.S. at 658; Comment, *supra* note 83, at 725.

403. *See* Golden v. Planning Bd., 30 N.Y. 2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).

court in *Arverne Bay Construction Company v. Thatcher* found a regulatory taking "permanent" after nine years.[404] Indefinite, extended takings clearly tie up capital and are probably inefficient.[405] They depress development and discourage real estate investment.[406] They may also be unreasonable restraints on alienation. In light of *Arverne*, a nine- or ten-year limit on prospective takings should be reasonable.

Compensation for the prospective taking should be paid in annual installments. Initially, local government will determine, on remand, via a Certificate of Alternate Use, a level of use which would remove the taking. The value of the property at that use would be calculated and paid annually. Since compensation is based on the use level indicated in the Certificate, local government does not get the benefit of depressed values attributable to the regulation.[407] After a maximum of ten years, government would be forced to elect between condemnation or allowing the land to be used at the level indicated on the Certificate. Courts could easily fashion such an order.[408]

Local government could pay for prospective takings with developer exactions.[409] Such exactions are already used to force subdividers to pay for the installation of roads, sewer and water services and to extract school and park dedications.[410] Such exactions, in the form of higher application fees, could be used to build an insurance fund out of which local government could pay for temporary takings.[411]

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404. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 233, 15 N.E.2d 587, 592 (1938).

405. Michelman, *supra* note 101, at 1213-15.

406. *Id.*

407. *See generally* Hagman, *supra* note 205, at 131, for a discussion of judicial aversion to the use of regulations to lower acquisition costs.

408. *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y. 2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970), where the court issued a prospective injunction which would take effect only if the defendant failed to pay permanent damages to the plaintiff for its easement to pollute.

409. R. ELLICKSON & A.D. TARLOCK, LAND-USE CONTROLS, 737-60 (1981). Local government often extracts user fees, cash contributions or dedications as the price of development approval. *Id.* at 738.

410. *Id.* at 738. Exactions may be statutory. Cal. Gov't Code §66477 (West Supp., 1987) specifically authorizes local governments to exact park dedications or in lieu cash contributions as a condition of tentative map approval.

411. Blume and Rubinfeld, *supra* note 338, at 571-72, 582-89. The authors note that private insurance against regulatory losses is not available. *Id.* at 582. The lack of insur-

5. *Offsets and marketworthy alternatives*

Government may be able to avoid paying compensation completely by using more creative forms of regulation, including offsets. Offsets, or value exchanges flowing from the government to the property owner are critical in two ways: in eliminating the taking and in providing non-monetary forms of just compensation. Offsets may include tax relief. In *Furey v. City of Sacramento*,[412] the City established a sewer district in an area targeted for residential development. It placed the area in a zoning classification that precluded residential use.[413] The California Supreme Court held that the ordinance was invalid unless the owners were relieved of their sewer assessments.[414]

Benefits which reduce the regulation's impact on use can avert a taking. Transferable development rights (TDR's) are an example.[415] A city may deny development at a given site (the granting lot) but allow a developer to transfer previously vested development rights to another site (the receiving lot). TDR's can be sold and therefore have at least some market value.[416] The availability of TDR's in *Fred F. French Investment Company v. City of New York*[417] and *Penn Central*[418] were important in determining whether a taking had occurred. In *Fred F. French*, the New York Supreme Court invalidated a City ordinance which restricted development on private parklands despite a TDR program because there were no receiving lots for the TDR's.[419] In

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ance results in inefficient land use and subsidizes speculators. *Id.* at 587-88. Government insurance, in the form of compensation, would evenly distribute the risk of regulation, but would also present a conflict of interest since government would be insuring against its own acts. *Id.* at 571-72, 599.

412. 24 Cal. 3d 862, 598 P.2d 844, 157 Cal. Rptr. 684, *app. dism.* 444 U.S. 976 (1979).

413. *Id.* at 868, 598 P.2d at 847, 157 Cal. Rptr. at 687.

414. *Id.* at 877, 878, 598 P.2d at 853, 157 Cal. Rptr. at 692, 693.

415. TDRs or Transferred Development Rights are a mechanism which allows a developer to transfer his development rights on a designated "granting parcel" to other "receiving parcels" when they cannot be used on the granting parcel because of land use restrictions. *See generally* Costonis, *supra* note 23, at 1061-70, for a discussion of TDRs.

416. Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

417. 39 N.Y. 2d. 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976).

418. *Penn Central*, 438 U.S. 104 (1978).

419. *Fred F. French*, 39 N.Y. 2d at 597-98, 385 N.Y.S.2d at 11-12, 350 N.E.2d at 388.

Penn Central, the Supreme Court found that the plaintiff had not been denied the use of airspace above its railroad terminal because the use rights were transferable to at least eight parcels in the terminal's vicinity. The majority opinion stopped short of finding that the TDR's were just compensation, but agreed that they mitigated the owner's financial burdens.[420]

The economic value of TDR's can be illusory, depending on how easily they can be transferred, market demand and the existence of legislative conditions on their use.[421] In *Fred F. French*, the court found that few receiving lots were available and that their availability was contingent on administrative approvals.[422] Because of this, the TDR program failed to preserve the economic value of the owner's development rights.[423] Local government must be careful that offsets and alternatives to cash compensation have reasonably certain value.

Other kinds of government programs can relieve a taking. In *Golden v. Planning Board of Town of Ramapo*,[424] the Town's growth management plan was upheld even though it barred development for 18 years. It was sustainable because the Town reduced property taxes in proportion to the depreciation caused by the restriction, allowed the landowner the option of accelerating development by installing municipal services himself, guaranteed development according to the Town's capital improvement timetable, and vested future development rights.[425] Less

420. *Penn Central*, 438 U.S. at 137.

421. The court in *Fred F. French*, 39 N.Y. 2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, found that TDRs granted by the City of New York did not preserve the developer's rights to use land because the availability of receiving lots depended on happenstance and their use was contingent on administrative approvals, adding "In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by attachment to tangible real property." *Id.* at 598, 385 N.Y.S. 2d at 11, 350 N.E.2d at 388. *But see Penn Central*, 438 U.S. 104, where the court found the TDRs proferred were transferable to at least eight parcels in the block surrounding the terminal and therefore valuable. *Id.* at 137. The *Penn Central* court added that, while the rights might not have constituted just compensation, had a taking occurred, they nevertheless mitigated the impact of the regulation, and were "to be taken into account in considering the impact of regulation." *Id.* at 137.

422. *Fred F. French*, 39 N.Y. 2d at 598, 385 N.Y.S.2d at 11, 350 N.E.2d at 388.

423. *Id.*

424. 30 N.Y. 2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).

425. *Id.* at 382, 334 N.Y.S.2d 155, 285 N.E.2d 304. *See* Costonis, *supra* note 23, at 1055-60. Costonis sees Ramapo's actions as an exercise of the "accommodation power" which maintained reasonable beneficial use. It looks more like an intelligent use of the

complex approaches may also work. In *Corrigan v. City of Scottsdale*,[426] city ordinances allowed an owner to increase the residential density on his developable land as compensation for development restrictions on the remaining portions of his property.[427] The density credits were rejected as just compensation only because the Arizona constitution required monetary compensation.[428]

There are indications that the Supreme Court has shifted its view of offsets and may be willing to consider them not just in evaluating whether a taking has occurred, but in terms of whether they represent just compensation. In *MacDonald, Sommer & Frates*, the Court divided the regulatory taking claim into two components: 1. the taking — i.e., proof that a regulation has gone too far, and 2. absence of compensation, i.e., proof that any compensation offered by the state is not just.[429] This signals a shift away from weighing offsets in evaluating the taking to viewing them in terms of whether they represent just compensation. This may allow the courts to resolve taking cases more easily because focusing on the justness of compensation — i.e., marketworthy alternatives and other forms of conventional or nonconventional compensation — may be easier than trying to decide whether all use was taken.

There is no reason just compensation must be in dollars.[430] The use of marketworthy alternatives should reduce the financial impact on cities as well as protecting property owners. The offsets must have enough tangible value: money value, not speculative value, is still the test.[431] While valuing offsets may be

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police power. Towns could avert many takings if they structured their regulations more fairly.

426. No. 18239-PR (Ariz., June 2, 1986).

427. Corrigan v. City of Scottsdale, No. 18239-PR, slip op. at 3 (Ariz., June 2, 1986).

428. *Id.* at 4.

429. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2566 (1986). *See also* Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108, 3121 (1985) (State action not complete until state fails to provide adequate postdeprivation remedy for loss).

430. Bauman v. Ross, 167 U.S. 548, 581-84 (1897). *See also* Costonis, *supra* note 23, at 1030-45. Costonis feels the emphasis on dollar compensation is misplaced. The Arizona State Constitution, however, requires that compensation be monetary. *See* Corrigan v. City of Scottsdale, No. 18239-PR (Ariz., June 2, 1986).

431. Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 597-98, 385 N.Y.S.2d 5, 11-12, 350 N.E.2d 381, 388 (1976).

difficult, it need not be impossible: as Professor John J. Costonis points out, we regularly value the impact of sewer improvements in assessing special district taxes.[432] The use of alternative forms of compensation will still result in some financial loss to local government. They may preserve enough use to prevent a regulation from being a taking. However, as compensation, they may not have enough tangible value to fully compensate an owner for the interest taken,[433] and some monetary compensation may still be due. For example, courts may find that the existence of vested future development rights in a *Golden*-type situation prevents a regulatory taking. Used as compensation, however, the vested rights may not have a dollar value equal to the rental/option/easement compensation due in a taking context.

Finally, marketworthy alternatives may be used in court orders providing equitable relief, either as the equivalent of just compensation or as measures which would relieve the taking.[434]

V. *MACDONALD, SOMMER & FRATES*, A CASE STUDY

MacDonald, Sommer & Frates v. County of Yolo[435] is a useful case study. The plaintiff's 44-acre parcel was located in the County of Yolo, outside Davis City limits. The parcel was zoned residential by Yolo County, but designated "Agricultural Preserve" by Davis, which embraced the land in its sphere of influence.[436] The County, which had included the land in a local sewer district to which the owner had contributed over $75,000 in assessments,[437] gerrymandered the sewer district borders after the Davis action and took the property out of the district, effectively cutting the property off from service.[438] Davis refused the owner's proposed extension of existing streets and rerouted other mapped streets to isolate the property. It refused both

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432. Costonis, *supra* note 23, at 1041.

433. *Id.*

434. Mandelker, *supra* note 203, at 504-05. The author feels that a legislative trend toward fashioning more specific injunctive relief would save cities money and give greater relief to landowners. Such orders would relieve the taking, i.e., make the regulation constitutional, so that a town would not be liable for just compensation.

435. 106 S. Ct. 2561 (1986).

436. Appellant's Brief at 5, MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986) (No. 84-2015).

437. *Id.* at 4.

438. *Id.* at 6.

dedication of public facilities and annexation of the property.[439] When the owner applied for a subdivision map as a first step toward residential development, the County denied its application on four grounds: lack of access, lack of sewer services, insufficient fire and police protection and inadequate water.[440] The Board went even further: it determined that the property could be used only for agricultural purposes.[441] Since a foot of topsoil had been removed and the land was infested with ineradicable pests, the land was useless for agriculture.[442] The Yolo County Board admitted the fact, calling the land "agriculturally impaired".[443] The owner, after another unsuccessful administrative appeal,[444] sued for a taking.

The Supreme Court held that the taking claim was premature because the plaintiff had not exhausted its administrative remedies,[445] agreeing with the California Court of Appeals that the County's refusal to permit the degree of development desired by the landowner did not preclude less intensive development.[446]

The multi-agency involvement made the plaintiff's position particularly uncomfortable. It was caught in a Catch 22 snare: it was unable to satisfy the County's map requirements because Davis would not provide city services and because the County itself would not provide sewers.

The petition procedure, had it been available in California, might have resolved the impasse. On denial of his appeal, the owner could have issued a formal letter to the City and County, claiming a taking. Its issuance would have forced Davis to reevaluate its position and negotiate with the County, resulting in a written determination of the level of development that both

439. *Id.*

440. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2563, 2564 n.2 (1986).

441. *Id.* at 2564 n.2. *See also* Appellant's Brief at 7, MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986) (No. 84-2105).

442. Appellant's Brief at 6, MacDonald, Sommer & Frates, 106 S. Ct. 2561 (1986) (No. 84-2105).

443. *Id.* at 7.

444. *Id.*

445. MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561, 2568-69 (1986).

446. *Id.* at 2565-67, 2567 n. 2.

the County and Davis would have tolerated in order to avoid a taking claim. If both stonewalled, the letter would have at least fixed the date of exhaustion of remedies and of the taking: the taking date would have been the date of the letter plus a reasonable response time.

The County and the City, at this juncture, could also have considered marketworthy alternatives: reduction of taxes, TDRs, offers to allow development if the owner installed services,[447] or vesting of future development rights, perhaps at levels lower than requested.

In any resulting litigation, satisfaction of the exhaustion requirement would have forced the courts to consider a taking on its merits. Applying the action versus intent standard in light of surrounding circumstances (property condition, social and economic conditions, the course of the government's conduct) the court might well have found a taking: Davis' acts clearly prohibited any residential use in light of the County's requirements and vice versa.

Had a taking been found, the case would have been remanded to the appropriate superior court which would order the County and Davis to issue Certificates of Alternate Use, to establish the minimal use level which would remove the taking, and to declare their intent to rescind, condemn or effect a prospective taking of up to ten years.

In the event of either rescission or a prospective taking, the court would use the Certificate to set compensation levels based on the option or rental value of the land for the period of the taking. In a prospective taking, the compensation would be reassessed each year. At the end of ten years, the land would be deemed subject to the use indicated on the Certificate if the government did not decide to condemn. In a condemnation, the owner would be compensated at the market value of the property at the use level indicated on the Certificate.

Marketworthy alternatives approved by the court could be

447. But note: the owners *had* offered to do so. *See* Appellant's Brief at 6, MacDonald, Sommer & Frates v. County of Yolo, 106 S. Ct. 2561 (1986) (No. 84-2105).

used at this point to offset some or all of the compensation due, subject to court approval and reasonably non-speculative value. The County could, for example, suppress property taxes for a designated period or pay for the installation of municipal services such as sewer hook-ups which the developer would otherwise bear. The burden of proving the value of marketworthy alternatives would be on the government.

VI. CONCLUSION

The Fifth Amendment does not distinguish between takings that are a result of eminent domain and those that occur because of regulation.[448] A taking is that which takes.[449] A unified approach to takings is mandated by the Constitution and by notions of fundamental fairness. By identifying the property interest involved, using circumstantial review, clarifying when administrative remedies have been exhausted and standardizing valuation, regulatory takings can be treated like the acts of eminent domain they really are. It is time to find the quark.

End Note. In June, 1987, the Supreme Court made two major contributions to the law of regulatory takings: it held that invalidation did not relieve government of the duty to compensate where its activity has taken all use of property,[450] and that a condition on the use of property must be related to a specific legislative purpose.[451]

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles[452] was the product of a county flood control ordinance adopted after spring floods ravaged canyonlands in the Angeles National Forest. The ordinance prohibited all building in the flood control zone, preventing the plaintiff from rebuilding a church camp destroyed in the floods.[453] The California Court of Appeals assumed that the complaint sought dam-

448. Bauman, *supra* note 26, at 49.

449. *Id.*

450. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S.L.W. 4781, 4786 (U.S. June 9, 1987).

451. Nollan v. California Coastal Commission, 55 U.S.L.W. 5145, 5148 (U.S. June 23, 1987).

452. 55 U.S.L.W. 4781 (U.S. June 9, 1987).

453. *Id.* at 4782.

ages for an uncompensated taking of all use, and denied relief on the basis of *Agins v. Tiburon*,[454] concluding that the remedy for a taking was limited to nonmonetary relief.[455] Isolation of the remedial question allowed the Supreme Court to bypass the usual stumbling blocks: exhaustion of remedies and definition of the taking.[456]

In *Nollan v. California Coastal Commission*,[457] the Court was confronted with an attack on a condition to a building permit issued by the Coastal Commission. The Commission required dedication of a public beach access easement in exchange for a permit to enlarge an existing residence.[458] The Supreme Court rejected the condition because it was not related to the original purpose of the building restriction.[459] The Commission, allegedly concerned about the public's visual access to the coast, failed to convince the Court that taking a physical access easement in exchange for a permit to block visual access advanced its primary purpose.[460] Absent a nexus between purpose and condition, the Commission's acts amounted to extortion, to a taking of property for which it must pay.[461]

Although significant, the June decisions ignore important taking issues and raise new questions. For example, neither case addresses exhaustion of remedies, and neither tackles the thorny issue of defining a regulatory taking. *First Church* refers to such a taking as "deprivation of all use".[462] However, the Court merely assumed a taking and never dealt with the question of when an owner has been deprived of all use.[463] *Nollan* found exaction of the easement a taking by analogy to physical invasion cases such as *Loretto v. Teleprompter Manhattan CATV*,[464] and

454. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

455. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S.L.W. 4781, 4783 (U.S. June 9, 1987).

456. *Id.* at 4783-84.

457. 55 U.S.L.W. 5145 (U.S. June 23, 1987).

458. *Id.* at 5145.

459. *Id.* at 5148.

460. *Id.*

461. *Id.*

462. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S.L.W. 4781, 4785 (U.S. June 9, 1987).

463. *Id.* at 4783-84.

464. 458 U.S. 419 (1982).

to principles of extortion,[465] concepts easier to manipulate than those involved in downzoning. In fact, instead of clarifying taking standards, *Nollan* complicates them. It adopts both the nexus requirement[466] and stricter scrutiny of police power regulations which affect property.[467] Apparently abandoning the usual deference to exercises of the police power which are rationally related to a legitimate state interest, the Court demands that such an exercise substantially advance a public interest where it abridges property rights.[468] Unfortunately, it does not clarify whether investment-backed expectations are a property right, leaving planners to wonder whether and at what point a developer's reliance on preliminary approvals will trigger this stricter scrutiny.

The two cases leave the issue of compensation largely unresolved. *First Church* seems to indicate that the leasehold value of the regulated property should be used as a basis for calculating compensation,[469] but does not resolve whether such value is to be based on the best and highest use of the property or something less. It holds that compensation is due for the entire period of time that a regulation denies an owner all use of his property,[470] but excludes "preliminary activity" from the taking period.[471] Its failure to define preliminary activity adds another complication to the compensation picture: it is less clear than ever how the duration of the taking should be calculated. Neither case addresses the use of marketworthy alternatives to cold cash. While *Nollan* deals unfavorably with the use of exactions by the state as a condition to development, it does not discuss the converse situation where government provides an owner special privileges or offsets in exchange for development restrictions on his property.

The regulatory taking impasse is far from resolved. Justice Stevens warned in his *Nollan* dissent that land-use planners are

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465. Nollan v. California Coastal Commission, 55 U.S.L.W. 5145, 5146, 5148 (U.S. June 23, 1987).

466. *Id.* at 5148.

467. *Id.* at 5149.

468. *Id.*

469. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S.L.W. 4781, 4785-86 (U.S. June 9, 1987).

470. *Id.* at 4786.

471. *Id.*

left guessing "how the Court will react to the next case, and the one after that."[472] In fact, all sides are left guessing. The unified field theory still needs more work.

*Barbara J. Savery**

472. Nollan v. California Coastal Commission, 55 U.S.L.W. 5145, 5156 (U.S. June 23, 1987) (Stevens, J., dissenting).

* Third year law student (Class of 1988), Golden Gate University School of Law.