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Regulatory Taking: A Cause of Action for Interim Damages

William Howell Freeman Jr.

COMMENT

REGULATORY TAKING: A CAUSE OF ACTION FOR INTERIM DAMAGES

The clash between the fifth amendment just compensation clause and the police power provides the backdrop for the role of a cause of action for damages in a regulatory "taking" case. The government may actually appropriate property for public use through the exercise of eminent domain.[1] However, the fifth amendment requires just compensation for formally condemned property.[2] The government also has police power to regulate land use for the health, safety, and general welfare of the public.[3] When the government merely regulates land use through the police power, the government does not have to award just compensation.[4]

However, at some point, the police power to regulate land may go so far as to effect a "taking" within the meaning of the fifth amendment.[5] Courts have struggled for decades to determine the threshold issue of when an exercise of the police power "goes too far."[6] Once a court decides that a "taking" has occurred, the court must still determine the secondary issue of what remedies are appropriate.[7] The reme-

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1. This right to "take" property has been recognized for at least seven and a half centuries. Section 39 of the Magna Carta (1215) provides that "[n]o free man shall be . . . deprived of his freehold . . . unless by the lawful judgment of his peers and by the law of the land." F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE 56 (1973). Typical public uses include public utilities, highways, and urban renewal. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954).

2. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fourteenth amendment makes the fifth amendment applicable to the states. *See* Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897).

3. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

4. E. FREUND, THE POLICE POWER 546-47 (1904). *Cf.* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 180 (1971).

5. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

6. *Pennsylvania Coal*, 260 U.S. at 415.

7. Comment, *Just Compensation or Just Invalidations: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711 (1982).

dies question is even more perplexing than deciding whether a regulation has become a "taking."[8] Does the regulation become a "taking" that merely requires invalidation of the regulation, or does the regulation become a "taking" that requires damages?

According to a literal approach, deciding that a regulation has become a "taking" suggests that an excessive regulation is a de facto exercise of eminent domain with the corresponding right to damages.[9] Another approach suggests that the word "taking" is merely a metaphor for the point beyond which the government would have to resort to its power of eminent domain.[10] According to this view, regulations that go beyond this point are merely invalid, with no corresponding right to damages.[11]

Thus, a landowner alleging excessive regulation has two alternatives. The property owner may seek a declaration that the regulation is invalid,[12] or he may seek damages for the unconstitutional invasion of his property rights.[13] If he decides to seek damages, he can rely upon the fifth amendment just compensation clause. The fifth amendment prohibition against "taking" is self-executing.[14] Therefore, the land-

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

9. Comment, *supra* note 7, at 714; San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting). For federal circuit court cases, see Hamilton Bank of Johnson City v. Williamson County Regional Planning Comm'n, 729 F.2d 402 (6th Cir. 1984), *rev'd*, 473 U.S. 172 (1985); Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1148 (9th Cir. 1983), *cert. denied*, 464 U.S. 847 (1983); Barbian v. Panagis, 694 F.2d 476, 482 (7th Cir. 1982); Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1043 (11th Cir. 1982); Hernandez v. City of Lafayette, 643 F.2d 1188, 1199 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). For state cases, see Pioneer Sand & Gravel v. Municipality of Anchorage, 627 P.2d 651, 652 n.2 (Alaska 1981); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1383 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981); Clifton v. Barry, 244 Ga. 78, 259 S.E.2d 35 (1979); Hamilton v. Conservation Comm'n., 12 Mass. App. 359, 425 N.E.2d 358 (1981); Pratt v. State, 309 N.W.2d 767, 774 (Minn. 1981); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Sheerr v. Township of Evesham, 184 N.J. Super. 11, 27-28, 445 A.2d 46, 54 (1982); Rippley v. City of Lincoln, 330 N.W.2d 505, 510 (N.D. 1983); Village of Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658 (1972), *cert. denied*, Chongris v. Corrigan, 409 U.S. 919 (1972); Zinn v. State, 112 Wis. 2d 417, 428-29, 334 N.W.2d 67, 72-73 (1983).

10. *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 274, 598 P.2d 25, 29, 157 Cal. Rptr. 372, 376 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 593-94, 350 N.E.2d 381, 385, 385 N.Y.S.2d 5, 8-9 (1976), *appeal dismissed*, 429 U.S. 990 (1976); *see also* Note, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1593 (1977) ("Holmes' famous words . . . [are] little more than an exaggeration or a figure of speech").

11. *See, e.g.*, Agins v. City of Tiburon, 24 Cal. 3d 266, 274, 598 P.2d 25, 29, 157 Cal. Rptr. 372, 376 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

12. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

13. *See, e.g.*, San Diego Gas & Elec. Co. v. San Diego, 81 Cal. App. 3d 844, 146 Cal. Rptr. 103 (1978), *appeal dismissed*, 450 U.S. 621 (1981).

14. *See* United States v. Clarke, 445 U.S. 253, 257 (1980).

owner may bring an action to compel just compensation even though the government has not instituted formal condemnation proceedings. This type of action is usually described as "inverse condemnation."[15]

Inverse condemnation has generally been available only in cases involving direct physical invasion of property rights.[16] However, with the expansion of land use restrictions, more landowners are bringing inverse condemnation suits when those restrictions substantially interfere with property rights.[17] As a result, the United States Supreme Court has had to face the perplexing secondary issue of whether the Court should allow inverse condemnation when land use regulation "goes too far."[18] The Supreme Court has characterized this issue as "the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark."[19]

This Comment will focus on the narrow issue of whether the Supreme Court should allow a cause of action for interim damages. The related issue of how to calculate such damages is beyond the scope of this Comment.

I. THE THRESHOLD ISSUE: CAN A REGULATION BECOME A TAKING?

The Supreme Court first addressed the threshold issue in *Mugler v. Kansas*.[20] Mugler owned a brewery in Kansas when the state enacted a prohibition statute. Mugler was convicted and fined $100 for manufacturing beer. On appeal, Mugler argued that the prohibition statute constituted a taking of property without just compensation.

The Supreme Court affirmed the conviction. Justice Harlan, writing for a unanimous Court, conceded that Mugler's brewery was "of little value if not used for the purpose of manufacturing beer."[21] However, the Court emphasized the distinction between an exercise of eminent domain and the police power. While exercising the power of eminent domain requires just compensation, this case involved the police

15. *Id.* Inverse condemnation differs from eminent domain in that the landowner, rather than the government, initiates the action. Hence, the process is the inverse of a formal condemnation.

16. *See* Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1441-42 n.9 (1974).

17. *See* Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 INST. ON PLAN., ZONING & EMINENT DOMAIN 177, 179-81.

18. *See, e.g.*, San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981).

19. 450 U.S. at 649 n.15 (Brennan, J., dissenting) (quoting C. HARR, LAND USE PLANNING 766 (3d ed. 1976)).

20. 123 U.S. 623 (1887).

21. *Id.* at 657.

power.[22] Instead of physically invading Mugler's brewery, the state had simply declared a use of property "to be injurious to the health, morals or safety of the community . . . ."[23] The Court stated that this "cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[24] Thus, the Court held that when the government does not directly encroach upon private property, government regulation will not be a taking.[25]

The Court reached a similar conclusion in *Hadacheck v. Sebastian*.[26] Hadacheck owned a brickyard, and the city annexed the area in which the brickyard was located. The area gradually became residential. The city passed an ordinance that prohibited making bricks within the city limits. Hadacheck was eventually jailed for violating the ordinance, and he petitioned for a writ of habeas corpus. He contended that the ordinance was unconstitutional since it decreased the value of his property by 87.5%.[27] Despite this substantial diminution in the value of the regulated land, the Supreme Court upheld the ordinance as a valid exercise of the police power.[28]

In *Pennsylvania Coal Co. v. Mahon*[29] the Court attempted to clarify and refine its position on the threshold issue of whether a regulatory taking had occurred. The coal company had acquired mineral rights by conveying property with deeds that expressly reserved the right to remove all coal. The deeds conveyed only the surface, and the grantees waived all claims for damages that might arise from the mining of coal. In response to this type of practice, the Pennsylvania legislature passed the Kohler Act. The statute prohibited the mining of coal in such a way as to cause the subsidence of buildings.[30] A homeowner brought an action to enjoin the coal company from mining under his land. The coal company argued that the Kohler Act caused a taking of the company's property. The coal company contended that the state could take the company's property rights only by condemnation with just compensation.

The Supreme Court held the Kohler Act unconstitutional.[31] Jus-

22. *Id.* at 668.
23. *Id.*
24. *Id.* at 668-69.
25. *Id.*
26. 239 U.S. 394 (1915).
27. *Id.* at 405.
28. *Id.* at 409-10.
29. 260 U.S. 393 (1922).
30. *Id.* at 412-13.
31. *Id.* at 414.

tice Holmes, writing for the majority, recognized the importance of the police power: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[32] However, he stated that the police power had its limits.[33] One factor in determining such limits is the extent of diminution the regulation causes in the value of property.[34] When that diminution reaches "a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[35] Accordingly, the question depends on the particular facts of the case—an ad hoc approach.[36]

In this particular case, Justice Holmes noted that only a single house was involved, and that the statute was not enacted for public safety. Therefore, he reasoned that the public interest did not warrant this much government interference. Moreover, the extent of the "taking" was great.[37] The statute purported to abolish the coal company's estate in land.[38]

II. THE SECONDARY ISSUE: INVALIDATION OR DAMAGES?

In what has been described as "ambiguous dicta,"[39] Justice Holmes also stated in *Pennsylvania Coal* that "[t]he 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."[40] What Justice Holmes meant by "taking" has caused considerable debate.[41] Did he mean "taking" that requires *invalidation* of the statute as a violation of the police power, or did he mean "taking" that requires *just compensation* in conjunction with the power of eminent domain? What Justice Holmes seemed to say is that if the police power to regulate

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32. *Id.* at 413.
33. *Id.*
34. *Id.*
35. *Id.*
36. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
37. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).
38. *Id.* at 414.
39. *See* Comment, *supra* note 7, at 721.
40. 260 U.S. at 415; *see also* Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889).
41. State courts often interpret the fact that *Pennsylvania Coal* resulted in invalidation, instead of damages, as disposing of any ambiguity. *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 274, 598 P.2d 25, 29, 157 Cal. Rptr. 372, 376 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385, 385 N.Y.S.2d 5, 9 (1976), *appeal dismissed*, 429 U.S. 990 (1976). *But see* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 649 n.14 (1981) (Brennan, J., dissenting) (the decision in *French* "tamper[s] with the express language of [*Pennsylvania Coal*]").

"goes too far," it will result in an exercise of eminent domain, which requires just compensation.

In his dissent, Justice Brandeis was anything but ambiguous when he stated, "[T]he legislature has power to prohibit such uses without paying compensation . . . ."[42] Responding to Justice Holmes' dicta, he reasoned that every regulation deprives the owner of some right in his property.[43] However, regulating to protect the public health, safety, or morals is not a "taking" that would require compensation. He drew an analogy to a "public nuisance."[44] He also drew a distinction between the power of eminent domain and the police power. Eminent domain involves power exercised for the purpose of conferring benefits. "[T]he police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger . . . ."[45] Justice Brandeis emphasized that regulated property remained in the possession of the owner. He also cited *Mugler v. Kansas* for the proposition that government regulation is not invalid merely because it deprives the owner of the only profitable use of his property.[46]

For the next forty years, the Supreme Court was silent on regulatory taking.[47] Then, in *Goldblatt v. Town of Hempstead*,[48] the Court had another opportunity to address the threshold issue of whether a "taking" had occurred. Goldblatt owned a sand and gravel mining operation. As a result of mining below the water table, there existed a twenty acre lake with an average depth of twenty-five feet on Goldblatt's lot. Goldblatt excavated on his lot for several years and the town gradually expanded to surround the excavation. Then, the town enacted an ordinance that prohibited any excavation below the water table. The town brought an action to enjoin further mining.

The Supreme Court upheld the ordinance as a valid exercise of the police power.[49] Justice Clark, writing for seven members of the Court, reasoned that Goldblatt had the burden of proving that the ordinance was a violation of the police power. Goldblatt had not produced evidence that the ordinance reduced the value of his lot, so he failed to

42. 260 U.S. at 417 (Brandeis, J., dissenting).

43. *Id.*

44. *Id.* at 419.

45. *Id.* at 422.

46. *Id.* at 418 (citing Mugler v. Kansas, 123 U.S. 623 (1887)).

47. However, the Court did uphold comprehensive zoning as long as the zoning did not constitute a violation of the police power. *See* Nectow v. Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

48. 369 U.S. 590 (1962).

49. *Id.* at 596.

carry that burden.[50] Therefore, the Court did not even reach the threshold issue of how far a regulation may go before it becomes a "taking."

In dictum, Justice Clark discussed *Mugler, Hadacheck*, and *Pennsylvania Coal*.[51] He reaffirmed the ad hoc approach of *Pennsylvania Coal* and the relevancy of comparing values of the property before and after the regulation. However, he cited *Mugler* and *Hadacheck* for the rule that a regulation that merely "deprives the property of its *most* beneficial use does not render it unconstitutional."[52] He also cited *Pennsylvania Coal* and stated, "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking *which constitutionally requires compensation.*"[53]

Taken at face value, *Goldblatt* would seem to clear up the ambiguity of what Justice Holmes meant by "taking." However, neither the coal company in *Pennsylvania Coal* nor the owner of the gravel operation in *Goldblatt* was seeking damages.[54] Did Justice Clark mean a "taking" that makes the regulation *invalid*, or did he mean a "taking" that requires *damages*?

The Supreme Court considered regulatory taking again in *Penn Central Transportation Co. v. New York City*.[55] In accordance with New York City's Landmark Preservation Law,[56] the city designated Grand Central Terminal as a "landmark." The owner of the terminal subsequently planned to construct an office building of more than fifty stories above the terminal's facade. The Landmarks Preservation Commission rejected the plan. The owner brought an action in the New York Supreme Court for an injunction. The trial court held the landmarks law unconstitutional as applied to the owner's property and granted the injunction. The Appellate Division reversed,[57] and the Court of Appeals of New York affirmed,[58] rejecting the owner's claim that the landmarks law had "taken" property without just compensation.

The Supreme Court affirmed, holding the landmarks law constitu-

50. *Id.*
51. *Id.* at 593-94.
52. *Id.* at 592 (emphasis added).
53. *Id.* at 594 (emphasis added).
54. *See supra* text accompanying notes 29 and 48.
55. 438 U.S. 104 (1978).
56. N.Y. Admin. Code tit. 8-A, § 205-1.0 (1976).
57. 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975).
58. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

tional.[59] Justice Brennan, writing for the majority, discussed the holdings in the Court's previous "taking" cases. He reasoned that the owner could still receive a profitable return on his investment since the landmarks law did not interfere with the present uses of the building.[60] It was possible that the city might allow some less intensive construction in the air space above the terminal. The city had also transferred the owner's development rights in the air space above the terminal to another of the owner's properties.[61]

Justice Brennan clarified the threshold issue by listing several factors to consider in the ad hoc determination of whether a regulatory "taking" had occurred. He cited *Goldblatt* for considering "the extent to which the regulation has interfered with distinct investment-backed expectations."[62] He also relied on *United States v. Causby*,[63] an inverse condemnation case, for the proposition that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government."[64]

In *Agins v. City of Tiburon*[65] the Supreme Court had its first real opportunity to resolve the secondary issue. The plaintiffs owned a five-acre tract of land. The city had adopted zoning ordinances placing the land in a residential planned development and open-space zone which would permit the owners to build between one and five single family residences on the tract. The owners brought suit for a declaration that the ordinances were unconstitutional. The owners also sought damages. The city demurred, claiming that the complaint failed to state a cause of action. The California Superior Court sustained the demurrer.[66]

The California Supreme Court affirmed.[67] The court held that a suit in inverse condemnation is not available in a regulatory "taking" case. Accordingly, the exclusive remedy is invalidation of the regulation in a suit for mandamus or declaratory relief. The California Supreme Court reasoned that Justice Holmes' use of the word "taking" indicated "the limit by which the acknowledged social goal of land control

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

60. *Id.* at 135.

61. *Id.* at 137.

62. *Id.* at 124 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)).

63. 328 U.S. 256 (1946) (holding that low air flights over the landowner's chicken farm constituted inverse condemnation).

64. *Penn Cent.*, 438 U.S. at 124.

65. 447 U.S. 255 (1980).

66. The state superior court granted the plaintiffs leave to amend their claim so as to seek a declaratory judgment, but the plaintiffs did not take that opportunity.

67. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

could be achieved by regulation rather than by eminent domain."[68] The court reasoned that Justice Holmes had not even considered the possibility of damages since no one had actually asked for compensation in *Pennsylvania Coal.*[69]

The California court also relied on policy considerations. The court cited "the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force that inheres in the inverse condemnation remedy."[70] In other words, allowing damages would inhibit effective land use regulation since local governments would be unable to pay.

The United States Supreme Court granted certiorari but declined to consider the issue of damages. The owners had not "submitted a plan for development of their property as the ordinances permit . . . ."[71] According to the Court, there was "as yet no concrete controversy regarding the application of the specific zoning provisions."[72] Justice Powell, writing for a unanimous Court, did not address Justice Holmes' use of the word "taking" or the policy considerations upon which the California Supreme Court relied.

III. The Soulution: Invalidation and Interim Damages?

In *San Diego Gas & Electric Company v. City of San Diego*[73] at least four members of the Supreme Court adopted a literal translation of Justice Holmes' use of the word "taking." The utility owned property that was zoned industrial and agricultural. It intended to build a nuclear power plant on its land. However, the city adopted an open-space plan that prohibited construction, and the city proposed a bond issue to acquire lands such as the utility's property. When the bond issue failed, the utility brought suit for mandamus, declaratory relief, and damages. A bench trial resulted in more than three million dollars in damages. The California Court of Appeal affirmed, but the California Supreme Court remanded for reconsideration in light of its intervening opinion in *Agins.* The court of appeal reversed its previous holding on the rationale that the California Supreme Court's decision in *Agins*[74] precluded a damage award. The court of appeal found that the

68. *Id.* at 274, 598 P.2d at 29, 157 Cal. Rptr. at 376.
69. *Id.*
70. *Id.* at 276, 598 P.2d at 31, 157 Cal. Rptr. at 378.
71. 447 U.S. at 260.
72. *Id.*
73. 450 U.S. 621 (1981).
74. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

record presented "disputed fact issues not covered by the trial court in its finding and conclusions," which would be available "should [appellant] elect to retry the case."[75] The California Supreme Court denied further review.

The United States Supreme Court could not agree with the holding below. According to the majority, the California Court of Appeal had not decided the threshold issue of whether a "taking" had occurred.[76] The court of appeal had merely remanded the case to the trial court.[77] Therefore, the majority of the Supreme Court dismissed because of the absence of a final judgment.

Justice Brennan, writing for the dissent, argued that the majority had fundamentally mischaracterized the holding of the California Court of Appeal.[78] According to Justice Brennan, the California Court of Appeal had reached a final judgment. That court had held, as a matter of federal constitutional law, that no cause of action is available for damages. Therefore, Justice Brennan argued that the Supreme Court should have decided the case on the merits.

More importantly, Justice Brennan expressed the views of at least four Justices on the damages issue. Justices Stewart, Marshall, and Powell joined in the dissent. The dissent recognized state court opinions that had interpreted Justice Holmes as "metaphorically" using the word "taking."[79] Justice Brennan stated that "[i]n addition to tampering with the express language of the opinion [in *Pennsylvania Coal*], this view ignores the coal company's repeated claim before the Court that the Pennsylvania statute took its property without just compensation."[80] Thus, at least four members of the Court adopted a literal translation of what Justice Holmes meant by "taking."

The dissent also argued that police power regulations can destroy the use of property just as effectively as formal condemnation or physical invasion of property. Consequently, "[i]t is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property."[81]

According to Justice Brennan, the purpose of the just compensa-

75. 450 U.S. at 631-32 (quoting the California Court of Appeal).
76. 450 U.S. at 631 n.11.
77. *Id.*
78. *Id.* at 637 (Brennan, J., dissenting).
79. *Id.* *See* cases cited *supra* note 41.
80. 450 U.S. at 649 n.14 (Brennan, J., dissenting).
81. *Id.* at 653.

tion clause is to prevent the government from forcing individuals to bear burdens that the public as a whole should bear. In his view, "once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation 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."[82] He said that the express words and purpose of the just compensation clause support this interpretation. Justice Brennan argued that as soon as the government "takes" private property, "the landowner has *already* suffered a constitutional violation."[83] He stated that the just compensation requirement of the fifth amendment is not precatory—any "taking" must be compensated.[84] He argued that the fifth amendment expressly guarantees just compensation.[85] As such, "the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches."[86] Thus, at least four members of the Court dismissed policy considerations as irrelevant to the issue of damages. At least four Justices also endorsed interim damages as a proper remedy in a regulatory taking case.

The dissenters did not endorse any particular rule for lower courts to use in calculating interim damages. "The States should be free to experiment in the implementation of this rule, provided that their chosen procedures and remedies comport with the fundamental constitutional command."[87] As a starting point, the dissent suggested "[o]rdinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary 'takings' involving formal condemnation proceedings, occupations and physical invasions . . . ."[88] These "ordinary principles" suggest that the proper measure of interim damages should include the "market rental value" of the property which is "taken," as well as incidental expenses of the property owner.[89]

In a concurring opinion, Justice Rehnquist apparently agreed with

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82. *Id.*
83. *Id.* at 654 (emphasis in original).
84. *Id.*
85. *Id.*
86. *Id.* at 661.
87. *Id.* at 660.
88. *Id.* at 658-59.
89. See Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 INDIANA L.J. 45 (1982) for a discussion of the proper measure of interim damages.

the dissent's endorsement of interim damages.[90] However, Justice Rehnquist agreed with the majority that there had been no final judgment below. He stated that he would feel better able to decide the damages issue if he knew "what disposition the California courts finally made of this case."[91]

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[92] three additional Justices assumed *arguendo* that damages are available. In *Williamson*, the bank's predecessor in interest had obtained the planning commission's approval of a "cluster" development. However, the planning commission subsequently disapproved of the plat for several reasons. As a result of the commission's objections, the developer claimed that the commission had allowed the developer to build only sixty-seven units. This was 409 fewer units than the planning commission's previous approval had allowed.[93] The bank filed a Section 1983[94] claim in the United States District Court for the Middle District of Tennessee. The jury awarded $350,000 for the "temporary taking" of the property. The court also entered a permanent injunction against the planning commission. The district court granted judgment notwithstanding the verdict on the damages issue. The Sixth Circuit Court of Appeals relied on the dissent in *San Diego Gas* and reinstated the jury verdict.[95] However, the United States Supreme Court reversed and remanded.[96]

Justice Blackmun, writing for four members of the Court, held that the Section 1983 claim was not ripe.[97] He stated that the developer had not sought variances to the cluster zoning ordinance. He also reasoned that Tennessee had adequate procedures for inverse condemnation and that "a property owner [must] utilize procedures for obtaining compensation before bringing a section 1983 action."[98] Even assuming *arguendo* that the fifth amendment requires payment of damages, the respondent had not used the procedures Tennessee provides for obtaining just compensation.

Justice Powell took no part in the decision. Justice White dissented from the holding that the case was not ripe. Justice Brennan, with Jus-

90. 450 U.S. at 633-34 (Rehnquist, J., concurring).
91. *Id.* at 636.
92. 105 S. Ct. 3108 (1985).
93. *Id.* at 3115.
94. 42 U.S.C. § 1983 (1982).
95. 729 F.2d 402 (6th Cir. 1984).
96. 105 S. Ct. at 3124.
97. *Id.* at 3117.
98. *Id. at 3121 n.13.*

tice Marshall joining, concurred in the Court's opinion without departing from their views in *San Diego Gas.*[99]

Justice Stevens also concurred in the judgment, but he went further to express his views on the damages issue: "The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that 'goes too far' as a 'taking' does not mean that such a regulation may never be cancelled and must always give rise to a right of compensation."[100] According to Justice Stevens, nothing in the Constitution entitles recovery for a temporary harm.[101]

Two additional Justices adopted a literal translation of "taking" in *MacDonald, Sommer & Frates v. Yolo County.*[102] A developer bought a forty acre plot of land and submitted a subdivision proposal to the Yolo County Planning Commission. MacDonald's plan called for 159 single family and multifamily residential lots on the forty acres. The County Board of Supervisors had previously zoned the land residential, but MacDonald's predecessors had used the land for agricultural purposes only. The Planning Commission and the Board of Supervisors denied the plan for several reasons: 1) inadequate access by public street; 2) inadequate sewer service; 3) inadequate police protection; and 4) inadequate water service.[103]

MacDonald filed suit against the county in California Superior Court, seeking an injunction and damages. MacDonald claimed that the county had denied it the entire economic use of its property for the sole purpose of providing a public, open-space buffer. The superior court dismissed the case for failure to state a claim upon which relief can be granted.

The California Court of Appeal affirmed on the basis of its previous decision in *Agins v. City of Tiburon.*[104] The court reasoned that damages are available only when the government takes some type of physical control over the land. Setting aside the regulation as unconstitutional was the only remedy available. According to the court, MacDonald may have a cause of action for an injunction, but not for damages.

The California Supreme Court denied certiorari, but the United

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99. *Id.* at 3124-25 (Brennan, J., concurring). *See* text accompanying note 78.

100. *Id.* at 3125-26 (Stevens, J., concurring).

101. *Id.* at 3126-27.

102. 106 S. Ct. 2561 (1986).

103. *Id.* at 2563.

104. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980). See *MacDonald*, 106 S. Ct. at 2565, for the Supreme Court's discussion of the reasoning of the California Court of Appeal.

States Supreme Court granted review. The issue before the Supreme Court was whether MacDonald had stated a cause of action for damages. However, a majority of the Supreme Court declined to reach the damages issue because the case was not ripe.

In an opinion by Justice Stevens, the majority conceded that a land regulation might be unconstitutional if that regulation "goes too far" in regulating land use.[105] However, the majority stated that the Court cannot determine whether a regulation has gone too far unless the Court knows how far the regulation goes. Justice Stevens argued that Yolo County had denied "only one intense type of residential development."[106] MacDonald "still has yet to receive the Board's 'final, definitive position regarding how it will apply the regulations at issue to the particular land in question.' "[107]

Four dissenters emphasized the procedural posture of this case and argued that MacDonald was merely seeking a cause of action.[108] Accordingly, they believed that the Court should interpret the facts in the light most favorable to the plaintiff. MacDonald had alleged in his complaint " '[t]hat any application for a zone change, variance, or other relief would be futile.' "[109]

Two of the dissenters, Chief Justice Burger and Justice White, would have allowed a cause of action for interim damages. Chief Justice Burger and Justice White were "in substantial agreement with Justice Brennan's discussion in *San Diego Gas*."[110] The other two dissenters, Justice Powell and Justice Rehnquist, would have remanded the case on the issue of interim damages to allow the state courts to address the issue. These two dissenters characterized the interim damages issue as "multifaceted and difficult."[111]

IV. Will the Court Recognize a Cause of Action for Interim Damages?

The Supreme Court has long recognized the clash between the police power and the fifth amendment just compensation clause.[112] The early cases held that land use regulation is a valid exercise of the police

105. 106 S. Ct. at 2566 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
106. *Id.* at 2568 n.8.
107. *Id.* at 2568 (quoting *Williamson*, 105 S. Ct. at 3119).
108. *Id.* at 2569 (White, J., dissenting).
109. *Id.*
110. *Id.* at 2573 (White, J., dissenting).
111. *Id.* at 2574 (Rehnquist, J., dissenting).
112. *See supra* note 1 and accompanying text.

power.[113] However, the Court also held that a regulation which "goes too far" becomes a "taking" within the meaning of the fifth amendment.[114]

Since *Pennsylvania Coal*, the Court has settled on an ad hoc approach for deciding the threshold issue of whether a "taking" has occurred. In *Pennsylvania Coal*, a 100 percent diminution in a property right was a "taking."[115] But an 87.5 percent decrease in property value was not enough in *Hadacheck*.[116] The Court has recognized various factors to consider in its ad hoc approach.[117] Nevertheless, *Pennsylvania Coal* is the only Supreme Court case to hold that a land use regulation went too far.[118]

The Court has also recognized the perplexing nature of the secondary issue: What remedies are available when the regulation "goes too far?"[119] Does the regulation become a "taking" that merely requires invalidation, or does the regulation become a "taking" that requires the payment of damages? According to the literal approach, deciding that a regulation has become a "taking" suggests that an excessive regulation is a de facto exercise of the power of eminent domain that gives rise to the right of damages in inverse condemnation.[120] The metaphorical approach suggests that finding a "taking" merely requires invalidation of the excessive regulation.[121] According to this view, the word "taking" is a metaphor for the point beyond which the government would have to resort to formal condemnation proceedings in order to accomplish the government's objectives.

The Court has granted certiorari in cases involving the damages issue four times in the last seven years.[122] As of yet, the Court has failed to reach the merits. In *San Diego Gas*, the absence of a final judgment stood in the way. In *Agins*, *Williamson*, and *MacDonald*, the cases were not ripe. These recent cases demonstrate the tremendous

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113. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

114. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

115. 260 U.S. 393 (1922).

116. 239 U.S. 394 (1915).

117. *See supra* notes 62-64 and accompanying text.

118. 260 U.S. 393 (1922); *cf.* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (just compensation for a physical taking of a navigational servitude); *see also* Kmiec, *supra* note 89.

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

120. *See* cases cited *supra* note 9.

121. *See* cases cited *supra* note 10.

122. For a recent case noting probable jurisdiction, see First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 106 S. Ct. 3292 (1986).

prudential hurdles an aggrieved landowner must overcome. The cases also provide an insight as to how the Supreme Court may hold on the damages issue.

San Diego Gas provides the most insight as to a future holding. In his dissent, Justice Brennan expressed the views of at least four members of the Court.[123] As a result, Justices Brennan, Marshall, Powell, and Stewart went on record as endorsing interim damages as a remedy. They took the literal approach and dismissed any policy considerations as inapplicable to express constitutional guarantees. In a concurring opinion, Justice Rehnquist had little difficulty agreeing with much of Justice Brennan's dissent.[124] In *Williamson*, Justices Blackmun and O'Connor assumed *arguendo* that damages are an appropriate remedy.[125] More significantly, Justice Stevens endorsed the metaphorical approach that would recognize invalidation as the only remedy available.[126] Finally, in *MacDonald*, Chief Justice Burger and Justice White substantially agreed with Justice Brennan's dissent in *San Diego Gas*.[127]

As a result of these recent cases, five of the Justices currently serving on the Court have endorsed a cause of action for damages. All five Justices have adopted the views expressed in the *San Diego Gas* dissent. If an aggrieved landowner can overcome prudential concerns such as ripeness and the threshold issue of whether a "taking" has occurred, the Supreme Court will probably recognize a cause of action.

If the dissent in *San Diego Gas* is any indication, the Court will not base its holding upon policy considerations. In Justice Brennan's words, "the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches."[128]

V. CONCLUSION

The fifth amendment expressly provides: "[N]or shall private property be taken for public use, without just compensation."[129] However, the courts have struggled for decades with the proper definition of

123. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 637, 649, 653-54, 658-61 (1981) (Brennan, J., dissenting); *see also* Kmiec, *supra* note 89.

124. 450 U.S. at 633-34, 636 (Rehnquist, J., concurring).

125. 105 S. Ct. 3108, 3115-24.

126. *Id.* at 3125-26 (Stevens, J., concurring).

127. 106 S. Ct. at 2573 (Burger, C.J., dissenting).

128. *San Diego Gas*, 450 U.S. at 661 (Brennan, J., dissenting).

129. U.S. CONST. amend. V.

"taken." This struggle indicates much confusion on what the fifth amendment "expressly guarantees." The Constitution does not exist in a vacuum. As the highest court in the land, the Supreme Court must interpret the Constitution in light of an ever-changing world.[130] Policy considerations should play an important role—especially when there is confusion over "express constitutional guarantees."

The Court should weigh the same policy considerations as the California Supreme Court weighed in *Agins*.[131] Widespread land use regulation is a relatively new concept. The United States Supreme Court first upheld a comprehensive zoning ordinance in 1926.[132] Since then, courts have realized that we must permit community planners a great deal of flexibility. If we hold local planners liable for inverse condemnation, the process of community planning might grind to a halt.

Local planners must be able to cope with tremendous problems in our cities and the need to preserve our natural resources. They must also be able to plan in order to protect residential property values. "This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe."[133] This threat would have a chilling effect on the exercise of the police power—the power of local planners to regulate for the health, safety, and welfare of the general public.

It may also be "a usurpation of legislative power for a court to force compensation."[134] Indeed, some zoning ordinances are enacted by the voters through direct initiatives. Should the courts hold the voters liable for inverse condemnation? Should the courts give voters this "unwelcome power to *inadvertently* commit funds from the public treasury?"[135]

Justice Brennan addressed some of these policy considerations in *San Diego Gas*. In a footnote, he expressed doubts as to whether the threat of inverse condemnation would greatly impede the efforts of land use planners.[136] He suggested that the threat of liability might produce a more rational basis of decision making in land use planning. This threat could "also encourage municipalities to err on the constitutional

130. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926).

131. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

132. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

133. Note, *supra* note 10, at 1597.

134. Note, *supra* note 16, at 1451.

135. Note, *supra* note 10, at 1598 (emphasis in original).

136. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. at 661 n.26 (Brennan, J., dissenting).

side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts."[137]

In spite of Justice Brennan's suggestions, there are strong policy reasons for allowing local planners a great deal of flexibility. The Court can allow a cause of action for interim damages *and* preserve much of this flexibility.

In the future, the Court should emphasize the procedural posture of cases similar to *MacDonald*; the Court should recognize that it would merely be allowing a *cause of action.* By allowing the cause of action, the Court can view the facts in the light most favorable to the plaintiff. On remand, the plaintiff will still have to prove that a "taking" has occurred—the threshold issue. The Court should emphasize that this is a very difficult hurdle to overcome. Indeed, *Pennsylvania Coal* is the only Supreme Court case to hold that a regulatory "taking" had occurred.[138] There, the regulation completely destroyed the property interest—a 100 percent diminution in value.[139] On the other hand, an 87.5 percent diminution was not a "taking" in *Hadacheck.*[140] By allowing a cause of action for interim damages, the Court can provide for the case in which the government regulation "goes too far." By emphasizing how rare such a case might be, the Court can preserve the flexibility municipalities need for effective land use planning.

William Howell Freeman, Jr.

137. *Id.*
138. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
139. *Id.*
140. Hadacheck v. Sebastian, 239 U.S. 394, 405-10 (1915).