Take It or Leave It: Uncertain Regulatory Taking Standards and Remedies Threaten California's Open Space Planning

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The remedies available to landowners who successfully challenge regulatory takings now differ between federal and state courts. In its recent land use decisions, the United States Supreme Court has failed to clarify either regulatory taking standards or appropriate remedies. Furthermore, the recent increase in federal land use decisions has decreased predictability in regulatory taking law. As a result, this article advocates that either land use controversies be left to state courts or the Supreme Court articulate clearer standards for these complex issues.

INTRODUCTION

Not since Justice Stewart announced his "I know it when I see it"[1] test of obscenity has the United States Supreme Court cast a major body of law into greater chaos than that now plaguing the law of police power land use controls. After a long, benign silence,[2] the Court recently muddied the waters of land use law with a trickle of unsettling opinions.[3] These cases address both

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[1] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[2] Between 1928 and 1974 the United States Supreme Court decided only two land use cases: Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance prohibiting sand quarry) and Berman v. Parker, 348 U.S. 26 (1954) (urban renewal).

[3] *See* San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981);

the standards used to determine regulatory takings and the remedies available to aggrieved landowners. These decisions deepen the sea of doubt surrounding government's power to regulate land use and confuse litigants as to the remedies available when government tries to "take too much."[4]

This article addresses the standards and remedies announced in these regulatory taking cases. It pleads for judicial clarification of what constitutes a regulatory taking and calls for greater harmony between state and federal remedies. This article also advocates a return to the federal courts' comparative silence on land use matters[5] that preceded the recent spate of ambiguous United States Supreme Court opinions.[6]

This plea is especially timely. California is now at the confluence of two powerful currents. Communities recognize the increasing necessity for open space lands;[7] yet, a tax-cutting initiative[8] has diminished local government revenues for acquiring open space land.[9] These forces now compel local governments to consider alternatives to purchasing park lands[10] when planning

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Agins v. City of Tiburon, 447 U.S. 255 (1980); Owen v. City of Independence, 445 U.S. 622 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[4] Springer v. Government of the Philippine Islands, 277 U.S. 189, 209-10 (1928) (Holmes, J., dissenting).

[5] *See* note 2 and accompanying text *supra*.

[6] *See* note 3 and accompanying text *supra*.

[7] For an example of a city ordinance that specifically recognizes the benefits of open space land, see Agins v. City of Tiburon, 447 U.S. 255, 261 n.8 (1980).

The State of California also considers preservation of open space land a necessity. *See generally* CAL. CONST. art. XIII, § 8 (West Cum. Supp. 1981); CAL. GOV'T CODE § 65560 *et seq.* (West Cum. Supp. 1980); Bowden, *Article XXVIII - Opening the Door to Open Space Control*, 1 PAC. L.J. 461 (1970).

[8] CAL. CONST. art. XIIIA (West Cum. Supp. 1981)(Proposition 13). Proposition 13 has four major provisions: A 1% limit on property tax revenues; limitations on assessments; voter approval requirements for future tax increases by the state government; and voter approval requirements for future local government tax increases. CAL. ASSEMBLY COMM. ON LOCAL GOV'T, THE IMPACT OF PROPOSITION 13 (THE JARVIS-GANN INITIATIVE) ON LOCAL GOV'T SERVICES AND FACILITIES 12 (1978) [hereinafter cited as IMPACT OF PROP. 13].

[9] Estimates indicate that Proposition 13 has caused a 32% reduction in state and local revenues for parks and recreation. IMPACT OF PROP. 13, *supra* note 8, at 124.

[10] As used in this article, "park" land connotes public lands that are actively used for recreational purposes. "Open space" land, on the other hand, refers to publicly or privately owned parcels that may not be developed or must remain in their present use. Such land is given a "passive" rather than a purely "ac-

for open space.

To further complicate matters, local planners face a limited range of options to carry out open space plans. Before the passage of Proposition 13,[11] California's tax cutting initiative, local governments relied on three legal mechanisms to acquire or retain open space lands. Two of these devices, contractual tax incentives[12] and acquisition by purchase,[13] now have lost much of

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tive" recreational use by the public. Examples of open space lands include preserved farm lands and urban greenbelts.

[11] CAL. CONST. art. XIIIA (West Cum. Supp. 1981).

[12] The use of contracts is not a widely adopted land-use technique. Indeed, the California Land Conservation Act (commonly called the Williamson Act), CAL. GOV'T CODE §§ 51200-51295 (West Cum. Supp. 1981), and its sibling, the Open Space Easement Act, *id.* §§ 51050-51097, are among the few programs using this technique.

As originally conceived, the Williamson Act and the Open Space Easement Act provided that landowners could enter into contracts with local governments restricting the use of their land to open space purposes for a minimum of ten years. Landowners could not break these contracts easily, and the contracts remained unaffected by sale or transfer of the property, or by the death of the landowner. The Williamson Act has since been amended to make all forms of open space land eligible for similar treatment. For example, a scenic highway corridor, a wildlife habitat, a salt pond, a managed wetland, a submerged area, or a public recreation area may now be restricted under the Act. *Id.* § 51201. In exchange for this restriction, the land is valued for property tax purposes at its capitalized value, which is lower than pre-Proposition 13 property tax levels. *See* CAL. REV. & TAX. CODE §§ 421-423 (West Cum. Supp. 1981). Proposition 13 has severely undermined these programs. Because Proposition 13 reduced the level of taxation on real property, it also reduced the incentive for most landowners to restrict use of their land to open space uses under these acts.

Yet, even before Proposition 13, this program was not fulfilling its intended purpose. The main reason for this failure was the voluntary nature of the contract technique. The value of real property in California has risen dramatically in the past twenty years. Tax incentives have proven inadequate to entice landowners to participate in the program because a ten-year open space restriction serves to thwart substantial monetary gains realizable upon resale of land within that period.

The major benefit of the Williamson Act and Open Space Easement Act has been as a political bluff-calling device. Landowners seeking permission to develop on the ground that the property tax was larger than their annual revenue from the land might be given the option of restricting their use to open space in exchange for a tax assessment, which would normally result in a lower tax and which, in any case, would always be keyed to their ability to pay.

For a more detailed discussion of the role which taxation plays in land use, see Bowden, *supra* note 7. *See also* the Forest Taxation Reform Act of 1976, CAL. GOV'T CODE §§ 51100-51155 (West Cum. Supp. 1981). This companion to

their practical attraction. Consequently, local governments must rely heavily upon the third means, police power regulation.[14]

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the Williamson and Open Space Easement Acts applies similarly to forested land in private ownership.

[13] Acquisition by purchase is a familiar technique of public agencies seeking to protect open space. Although Proposition 13 reduced the amount of public revenue available to purchase open space lands, *see* note 9 *supra*, other acquisition tools that do not involve purchase have been instituted. "Exaction" is the most viable non-expenditure acquisition mechanism for open space protection. Exaction usually refers to the landowner's mandatory dedication of land in exchange for discretionary land use permits. Several cases have tested the validity of this tool. In each, a local government conditioned granting a permit upon the dedication of some of the owner's land to the public for street widening. *See, e.g.*, Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1966) (landowner required to dedicate a strip of county road for street widening pursuant to County Master Plan in exchange for extension of variance); Ayres v. City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) (developer required to dedicate substantial strip of land in exchange for municipal approval of subdivision map); Southern Pac. Co. v. City of Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (2d Dist. 1966) (permit to expand warehouse granted in exchange for land).

Exaction now comprises part of a comprehensive statutory program of open space acquisition. *See* Associated Homebuilders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (local ordinance requiring developers to dedicate portions of their subdivisions as open space or pay a fee before obtaining local approval of their subdivision map held constitutional).

Refinement of California's position on open space dedication followed *Associated Homebuilders*. The California Legislature has amended the open space dedication law in several significant respects. *See* CAL. GOV'T CODE § 66477 (West Cum. Supp. 1981). These new amendments provide standards for open space and park exactions imposed on subdividers. The criteria include: (1) adoption by the locality of a general plan containing a recreation element, *id.* § 66477(c); (2) the existence of *some* relationship between the exaction and the recreation needs created by the subdivison, *id.* § 66477(e); (3) adoption of a development schedule specifying how and when the exaction will be used, *id.* § 66477(f); (4) specification of standards within the ordinance for determining the proportion of a subdivision to be dedicated and the amount of any fee to be paid in lieu of dedication, *id.* § 66477(b); and (5) distribution to the new lot owners of any fees collected and not used within five years of collection, *id.* § 66477(f).

These new standards serve a dual function. First, they strengthen the requirement that some relationship exist between the subdivision and the increased need for parks and open space. Second, they ensure that the locality will apply the exaction toward recreational purposes pursuant to the general plan. Thus, exactions are a feasible means of public acquisition of open space without direct expenditure. However, their application is limited. Exactions may be used only to acquire open space in the content of *new* subdivisions.

[14] *See* Heyman, *Innovative Land Use Regulation and Comprehensive Plan-*

Developments in regulatory taking law, however, threaten to force local governments to be circumspect in their use of open space programs that depend on regulation. The tests of a valid regulation are complex and confused,[15] fostering uncertainty as to the validity of the efforts of those entrusted with the responsibility of drafting open space ordinances. The dual jurisdiction possessed by state and federal courts in taking cases,[16] and the different analytical approach employed by each to determine a taking,[17] exacerbate this uncertainty. Moreover, an aggrieved landowner may seek either of two distinct remedies. Some state courts,[18] including those of California,[19] invalidate judicially offensive ordinances. Federal courts, on the other hand, have not ruled out monetary damages in inverse condemnation.[20] These

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ning, 13 SANTA CLARA LAW. 183, 200-09 (1972).

[15] *See* text accompanying notes 31-71 *infra*.

[16] The fifth amendment explicitly provides the basis for federal jurisdiction over taking cases. "[N]or shall private property be taken for public use without just compensation [by the federal government]". U.S. CONST. amend. V.

The fourteenth amendment administers this prohibition to the states, thereby providing each state with jurisdiction over taking cases. "[N]or shall any state deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Accordingly, the California Constitution mandates that "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has been paid to, or into court for, the owner." CAL. CONST. art. I, § 19 (West Cum. Supp. 1981).

[17] *See* text accompanying notes 37-71 *infra*.

[18] Those states that limit the remedy for a regulatory taking to ordinance invalidation include: Arizona, Davis v. Pima County, 121 Ariz. 343, 590 P.2d 459 (1978); Colorado, Gold Run Ltd. v. Board of County Comm'rs, 38 Colo. App. 44, 554 P.2d 317 (1976); Florida, Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. 1974); Minnesota, Holaway v. City of Pipestone, 269 N.W.2d 28 (Minn. 1978); New York, Fred French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 187 N.Y.S.2d 5 (1973); North Dakota, Eck v. City of Bismark, 283 N.W.2d 193 (N.D. 1979); Oregon, Fifth Ave. Corp. v. Washington County, 282 Or. 591, 581 P.2d 50 (1972); Pennsylvania, 53 PA. CONS. STAT. ANN. § 11001 (Purdon 1981), *applied in* Gaebel v. Thornbury Township, 8 Pa. Commw. Ct. 399, 303 A.2d 57 (1973) (statute limits remedy to invalidation).

[19] Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980).

[20] Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959) (plaintiffs subjected to federal order prohibiting airplane flights to plaintiff's recreational land given monetary damages in inverse condemnation). No Supreme Court decision has held, however, that money damages in inverse condemnation are available for local regulatory takings. *See* text accompanying notes 80-98 *infra*.

differing approaches and remedies encourage litigants to forum shop and may undermine land use planning for open space in California.

This article explores how these judicial differences interact to shape a trend toward decreased predictability in regulatory taking law. Part I discusses federal and California law on the validity of land use regulations. Part II compares federal and California remedies for regulatory takings, and introduces the potential federal monetary remedy afforded by section 1983[21] of the Civil Rights Act of 1871. It concludes with a critical evaluation of the extension of section 1983 to garden-variety zoning cases.[22] In Part III, the authors urge the United States Supreme Court to articulate clearer standards for what constitutes a regulatory taking and to refrain from extending section 1983 to regulatory taking controversies.

I. Regulatory Validity and the Taking Standards

Federal and state constitutional protections[23] prevent a local government from using its regulatory power to compel public access to privately owned open space land. Accordingly, federal and state courts have developed means to guard against excessive regulation.

Validity under both federal and California law requires that a regulation satisfy a tripartite test. First, both systems require that a land use regulation carry out a valid legislative goal.[24] Second, both systems require that a land use regulation equally

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[21] 42 U.S.C. § 1983 (Supp. III 1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

[22] This article uses the term "garden-variety zoning cases" to refer to zoning ordinance disputes, general plan controversies, and other legal actions not tainted with underlying discriminatory motives. *See* text accompanying notes 133-135 *infra*.

[23] *See* note 16 *supra*.

[24] *See* text accompanying notes 28-33 *infra*. *See also* Marcus, *A Comparative Look at TDR Subdivision Exactions, and Zoning as Environmental Preservation Panaceas: The Search for Dr. Jekyll Without Mr. Hyde*, 20 Urb. L. Ann. 3, 31 (1980).

treat those subjected to its strictures.[25] Third, both systems prohibit local government from using a regulation as a substitute for purchasing a public land so as to constitute a taking.[26] Federal and California courts, however, employ different approaches to determine whether a regulation constitutes a taking.[27]

Element One: Valid Legislative Goal

On the federal level, substantive due process invalidates any regulation that is "not reasonably necessary to the effectuation of a substantial public purpose."[28] A regulation meets this requirement when the goal of open space retention has some rational basis in promoting the general welfare.[29] Recently, the United States Supreme Court specifically recognized that discouraging "premature and unnecessary conversion of open-space

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[25] *See* text accompanying notes 34-36 *infra*.

[26] *See* text accompanying notes 37-69 *infra*.

[27] *See* text accompanying notes 56-69 *infra*.

[28] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 128 (1978). *Penn Central* arose out of an historic preservation ordinance adopted by the City of New York, which designated some 400 buildings as historically significant. One of these was the Penn Central Terminal. Its owners sought to build a 50-story office building on top of the terminal. Their request was denied on the ground that the proposed structure would reduce the terminal building to an "aesthetic joke." The ordinance did, however, grant the owners transferable development rights, in the air space above the terminal, which under the applicable zoning regulations could be used for development, but which, due to the historical designation, could not be used. These rights had value to landowners in the area since they would allow the construction of buildings higher than would otherwise be permitted. Thus, the Court found that the ordinance did not violate substantive due process or constitute a taking. *See* note 29 *infra*.

On the law of substantive due process in the land use context, *see generally* Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity*, 8 HASTINGS CONST. L.Q. 585 (1981); Marcus, *supra* note 24, at 31; Michaelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

[29] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125-27 (1978). In elaborating the "general welfare" test of validity in *Penn Central*, the Court cited three examples. In Miller v. Schoene, 276 U.S. 272 (1928), the Court upheld a regulation requiring the destruction of diseased trees. In Hadacheck v. Sebastian, 239 U.S. 394 (1915), the Court upheld a law prohibiting the use of certain land for the manufacture of bricks. Finally, in Goldblatt v. Hempstead, 369 U.S. 590 (1962), the Court upheld a regulation prohibiting the continued use of a sand quarry.

land to urban uses" is a valid legislative goal.[30]

California courts administer this substantive due process protection through the fourteenth amendment.[31] A California Court of Appeal[32] has approved state legislation requiring cities and counties to adopt open space plans and zoning ordinances.[33] Thus, California's judiciary also recognizes that protection of open space lands is a valid legislative goal.

Element Two: Equal Treatment for Those Regulated

The fifth amendment's equal protection guarantee requires that laws deal similarly with people in similar situations and treat people of different circumstances differently.[34] This protection applies to both federal and state regulations.[35] Consequently, no open space ordinance may unfairly discriminate among similarly situated landowners.

The equal protection guarantee, however, does not compel

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[30] Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (quoting CAL. GOV'T CODE § 65561(b) (West Cum. Supp. 1979)).

[31] *See* note 16 *supra*.

[32] *See, e.g.*, Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1st Dist. 1977) (city prevented from approving subdivision because it failed to adopt an open space plan pursuant to CAL. GOV'T CODE § 65560 (West Cum. Supp. 1980)). *See also* Candlestick Properties v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1st Dist. 1970) (land fill prohibited to protect open space).

California courts have also upheld various zoning restrictions related to open space. It is a legitimate use of regulatory power, for example, to limit development in flood plains, *see* Helix Land Co. v. City of San Diego, 82 Cal. App. 3d 932, 147 Cal. Rptr. 683 (4th Dist. 1978); Turner v. Del Norte, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1st Dist. 1972), and on land adjacent to beaches. *See* McCarthy v. Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954).

[33] *See* CAL. GOV'T CODE §§ 65560-65570, 65910-65912 (West Cum. Supp. 1981).

[34] *See* Tussman & tenBroeck, *The Equal Protection of the Laws*, 38 CALIF. L. REV. 341 (1949).

[35] If the federal government classifies individuals in a way that would violate the fourteenth amendment equal protection clause ("No State shall . . . deny to any persons within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1), it will have contravened the due process clause of the fifth amendment, which has identical standards of validity. *See, e.g.*, Weinburger v. Weisenfield, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975); Bolling v. Sharpe, 347 U.S. 497 (1954). *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. Rev. 540 (1977).

complete uniformity of treatment. Local governments may single out one parcel for more rigorous regulatory treatment than that imposed on surrounding landowners, provided that a rational basis exists for the difference in treatment.[36]

Element Three: Regulation Must Not Substitute for Acquisition

Federal and California courts apply the foregoing elements of the valid regulation test in an identical manner. This is not true of the third element. Each system uses a different approach to determine whether a regulation constitutes a taking.

A. The Federal Standards for Regulatory Takings

Penn Central Transportation Co. v. City of New York[37] remains the United States Supreme Court's clearest statement on federal taking law. In that case, the Court considered whether New York's historic building preservation law[38] unduly bur-

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[36] Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (prohibition of rock, sand and gravel mining on land useful for no other purpose including that permitted by zoning ordinance upheld as valid), *appeal dismissed*, 371 U.S. 36 (1962). For an excellent illustration of non-uniform treatment of landowners, see Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 146 Cal. Rptr. 687 (1st Dist. 1978), in which the court notes that "[s]o long as rational basis exists for a zoning decision" that is more burdensome on one landowner than on any other, "the purpose or motive of the ordaining body becomes irrelevant to any inquiry into its reasonableness." *Id.* at 676, 146 Cal. Rptr. at 694.

As with equal protection law generally, the standard of review is elevated where the motive behind the regulation is suspect. *See, e.g.*, Kissenger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (2d Dist. 1958) (court entitled to "give weight to the evidence disclosing a purpose other than that declared by the ordinance in determining its validity" where city ordinance reclassified plaintiff's property in a manner calculated to make it available at "a lesser price" for airport use).

[37] 438 U.S. 104 (1978); *see* note 28 *supra*.

[38] N.Y.C. Admin. Code, ch. 8-A, § 205-1.0 *et. seq.* (1976). The Landmarks Preservation Law established a commission to identify properties and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the city [of New York], [the] state or nation." *Id.* § 207-1.0(n). Upon the Commission's determination that a building satisfies established criteria, a public hearing is held. After the public hearing, the Commission designates the building a "landmark" situated on a "landmark site." After designation, New York City's Board of Estimate examines the relationship of the property to New York

dened the owner of the Penn Central terminal and thereby constituted a taking.[39]

Two distinct standards may be distilled from *Penn Central* to determine whether a land use regulation results in a taking.[40] First, a taking occurs when a regulation frustrates "distinct investment-backed expectations"[41] or results in an "unduly

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City's general plan, the zoning resolution, projected public improvements, and any urban renewal plans for the area. The Board of Estimate may then modify or disapprove the designation. The owner may also seek judicial review of the final designation. Final designation requires the owner to keep the exterior features of the building "in good repair and receive prior approval from the Commission before making any external alterations." When the Court decided *Penn Central*, the commission had designated over 400 landmarks. *See* Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 110-115 (1978).

[39] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 122 (1978).

[40] The authors of this article derived these standards from the five "significant factors" enumerated by Justice Brennan in the majority opinion that courts should use in determining the validity of land use controls. The first factor is "the economic impact of the regulation on the claimant" and, particularly, the extent to which the regulation has interfered with "distinct investment-backed expectations." *Id.* at 124 (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962) (prohibition against dredging sand below water table not a taking if it is a threat to public safety)). Second, "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by Government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (citing Causby v. United States, 328 U.S. 256 (1946) (low flying aircraft, when approaching airport, invaded air space, and thereby rendered use of land for chicken farm impossible, constituted a physical invasion and, thus, a taking)). Third, taking claims based on economic harm will not be supported if the regulation "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property.' " 438 U.S. at 124-25 (citing United States v. Willow River Power Co., 324 U.S. 499 (1945) (interest in high water level of river for power generation is not a protected property right)). Fourth, no taking will be found where public health, safety, and general welfare demand that certain land uses be prohibited. 438 U.S. at 125 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning not a taking)). Finally, Justice Brennan said, "Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute takings." 438 U.S. at 128 (citing Causby v. United States, 328 U.S. 256 (1946)). *See* Marcus, *supra* note 24, at 31 for identical derivative standards for takings.

[41] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978). One year later, the Court restated the term "investment-backed expectations" in Andrus v. Allard, 444 U.S. 51, 65 n.21 (1979). The following term, the Court reformulated the *Penn Central* standard as denying "an owner economically

harsh impact upon the owner's use of his property."[42] Second, a taking occurs where a regulation's purpose or effect is to acquire public resources or to advance an entrepreneurial function of government.[43]

Unfortunately, these standards provide sparse guidance to attorneys who must draft land use ordinances. In *Penn Central*, the Court failed to define directly the term "distinct investment-backed expectations." Subsequent Supreme Court treatment has confused rather than clarified its meaning.[44] Without such definitional guidance, the term's ambiguity makes judicial application of this first federal standard difficult.[45]

Determining when a regulation advances a uniquely governmental function is equally problematic. This determination may be made easily when government uses its regulatory power to depress the price of land targeted for condemnation.[46] But diffi-

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viable use of his land." Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

Thus far, lower federal courts that have applied the *Agins* formulation seem to require a total denial of "economically viable use" of the subject parcel. *See, e.g.*, Oceanic Cal., Inc. v. City of San Jose, 497 F. Supp. 962, 973 (N.D. Cal. 1980) (no taking found where some economic use of land remains); *cf.* Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 850 (E.D. Va. 1980) (landmark preservation law not a taking where all development or industry not prohibited thereby). However, the United States Supreme Court has yet to issue such a holding.

[42] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

[43] *Id.* at 128.

[44] *See* note 41 *supra.*

[45] Such a standard seems easy to apply where government physically demolishes a building without notifying a mortgagee with a security interest therein. *See* Superior Sav. Ass'n v. City of Cleveland, 501 F. Supp. 1244 (N.D. Ohio 1980) (existence of building constitutes morgagees' distinct investment-backed expectation). But ease of application evaporates when courts scrutinize zoning regulations under this standard. *See, e.g.*, William C. Haas & Co. v. City & County of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (no taking found where height limitation regulation lowered value of landowner's parcel from $3 million to $100,000, although landowner was undoubtedly "frustrated").

[46] *See, e.g.*, Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966). In 1950, pursuant to its redevelopment program, the City of Detroit froze the use of plaintiff's land and commenced a condemnation action. Ten years later, with plaintiff's use still frozen, the City dropped the suit. By then plaintiff's property had substantially deteriorated in value. The Court found the City's conduct so unconscionable as to reach the level of a taking. A Ninth Circuit case concerning redevelopment reached a similar result. Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977). *See also* Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970). In that case, the

culty occurs when courts must evaluate the validity of garden-variety open space regulations that are unaccompanied by such condemnation activity.

These standards thus fail to apply to the regulatory context in a manner that enables interested parties to predict the outcome of regulatory taking litigation.[47] The recognized difficulty inherent in formulating prophylactic taking standards[48] perpetuates federal adherence to an *ad hoc* approach to these matters.[49] Consequently, federal taking law remains uncertain in substance and unpredictable in effect.

Prophylactic federal standards are necessary. A primary duty of any legal system is to avoid unnecessary social conflict[50] that, *inter alia*, consumes scarce judicial resources. Conflict mitigation

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National Park Service informed plaintiff that it sought to acquire his property pursuant to the Point Reyes National Seashore Bill. Rather than purchasing the property, the Park Service thwarted plaintiff's subdivision plans by acquiring land plaintiff needed for a right-of-way to a county road. Having destroyed the private market for plaintiff's land, the Park Service found it unnecessary to purchase it. The Court of Claims held this "arbitrary and unreasonable treatment" a taking. *Id.* at 586.

[47] Other taking standards the United States Supreme Court has mentioned from time to time have yielded no greater predictability. *See, e.g.*, Kaiser-Aetna v. United States, 444 U.S. 164, 179-80 (1979) (extinguishing a fundamental attribute of ownership); United States v. Causby, 328 U.S. 256 (1946) (preventing best use of land).

[48] *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287, 1302 n.15 (1981) (Brennan, J., dissenting) (Justice Brennan cited authority and commented upon the Court's inability to resolve the taking standards problem); Kaiser-Aetna v. United States, 444 U.S. 164 (1979) (Court unable to come up with any "set formula"). *See generally* Note, Penn Central Transporation Company v. New York City: *Easy Taking-Clause Cases Make Uncertain Law,* 1980 UTAH L. REV. 369.

[49] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) ("ad hoc, factual inquiries").

[50] There may also arise incompatibilities between the interest of a single individual or group of individuals on the one hand and the interests of society viewed as an organized collective group on the other. The government may wish to build roads or erect structures in places occupied by a private owner. . . .

> It is one of the chief functions of the law to adjust and conciliate these various conflicting interests, individual as well as social. This must be done, in part at least, by the promulgation of general rules assessing the weight of various interests and providing standards for their adjustment.

E. BODENHEIMER, JURISPRUDENCE 262-63 (1967).

results when laws inform potential litigants of their respective chances of prevailing at trial, thereby encouraging settlement. Taking standards that afford both landowners and local government some semblance of certainty as to the validity of a given open space ordinance thus ensure that landowners harbor "reasonable investment expectations"[51] and that local government makes proper use of its police power.[52]

One may argue that ambiguous taking standards actually encourage settlement. Since neither local government nor an aggrieved landowner can accurately predict the outcome of a regulatory taking dispute, the parties may settle rather than incur the time and expense of litigation. But a standard that holds that a regulation constitutes a taking when an investor becomes disappointed[53] seems unlikely to provide government or landowners with the notice each needs to deal amicably with one another. The absence of firmer standards thus fosters rather than discourages unnecessary litigation.

The absence of firm federal standards also burdens state courts.[54] California's judiciary continues to struggle with the paucity of federal guidance. Recent California decisions evidence an attempt to arrive at a prophylactic approach to regulatory takings despite the federal judiciary's failure to formulate workable guidelines.

B. California's Approach to Deciding Regulatory Taking Cases

On its face, the California judiciary's approach to deciding regulatory taking cases appears to be *ad hoc*.[55] The standard that California courts employ in determining if a regulation constitutes a taking is whether the effect of the regulation "is to deprive the landowner of substantially all reasonable use of his

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[51] *See* Oceanic Cal., Inc. v. City of San Jose, 447 F. Supp. 962, 974 (1980).

[52] "Discretion without a criterion for its exercise is authorization of arbitrariness." Brown v. Allen, 344 U.S. 443, 496 (1952)(Frankfurter, J.).

[53] *See* note 41 *supra*.

[54] *See* note 16 *supra*.

[55] "[W]hether a regulation is excessive in a particular situation involves questions of degree, turning on the individual facts of each case . . . ." Agins v. City of Tiburon, 24 Cal. 3d 266, 277, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378 (1979), *aff'd*, 447 U.S. 255 (1980).

property."[56]

However, a California District Court of Appeal recently constructed a framework for deciding regulatory taking issues that provides local governments and landowners with broad guidelines as to the limits of regulation. In *Rancho La Costa v. County of San Diego*,[57] a county government appealed a trial court's finding that the county's regulatory activity "had taken [plaintiff's] property without due process of law under the California and United States constitutions."[58] In its decision, the Fourth District Court of Appeal distinguished between two categories of governmental action, "precondemnation" conduct[59] and

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[56] *Id.*

[57] 111 Cal. App. 3d 54, 168 Cal. Rptr. 491 (4th Dist. 1980).

[58] *Id.* at 57, 168 Cal. Rptr. at 492. In *Rancho La Costa*, the Court held that no taking occurred where local government's efforts to preserve its general plan prevented landowners from developing a subdivision. Plaintiff sought to develop as a subdivision a 1,980 acre parcel situated in the coastal zone, which the city had zoned for agricultural uses. In 1961, after conducting feasibility studies and negotiations with the state and county, plaintiff paid to elevate a bridge that led to the parcel. In 1967, the San Diego General Plan was adopted, designating plaintiff's parcel for residential uses with medium-low density and including part of it in a proposed regional park. In 1969, the County Board of Supervisors adopted an informal policy that all proposals for changes in zoning on parcels located within the proposed park would not be entertained. In 1970, the county initiated a park planning and acquisition feasibility study, the results of which the board adopted in 1972. The county then began purchasing property surrounding the plaintiff's parcel. In May of 1972, plaintiff filed an application with the Local Agency Formation Commission (LAFCO) for annexation of its entire parcel to the nearby City of Carlsbad to obtain municipal services. The County Planning Department recommended against annexation of the part of the parcel in the proposed park, and two supervisors serving on LAFCO actively opposed such annexation. LAFCO denied annexation. Thereafter, the County Board of Supervisors adopted a resolution indicating it did not intend to approve rezoning incompatible with the proposed park. Plaintiff sued for money damages in inverse condemnation. The trial court depicted the county as "a material and procuring cause" of the denial of annexation and awarded plaintiff $6 million in damages. The county appealed. The Court of Appeals reversed the trial court's finding that a taking had occurred on the grounds that the county's regulatory activity advanced the legitimate governmental goal of preserving the general plan, and active efforts to bring all information before a regional regulatory authority was appropriate regulatory activity.

[59] *See, e.g.*, Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). In *Klopping*, the city adopted a municipal resolution to form a parking district. Plaintiff's properties were included among those to be condemned under the resolution. The city mishandled the formation of a prop-

"plan designation" activity.[60]

Cases falling within the precondemnation category involve regulation tainted with threats of condemnation.[61] In such cases, California courts require a local govenment to purchase private property quickly or cease acting altogether.[62]

Plan designation cases include situations in which a local government merely designates on its general plan future public development of a privately owned site.[63] California courts hold that these plan designation actions are not takings because "the adoption of a general plan is several leagues short of a firm declaration of intent to condemn property."[64] Further, California courts permit local governments to implement their general plans by rezoning parcels to classifications consistent with the plans.[65]

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erty tax assessment district to pay the costs of condemnation and delayed the process for a substantial period of time. Meanwhile, the city announced its future intent to condemn plaintiff's land. This announcement deterred shopkeepers from locating in the buildings that were to be condemned. In the course of these events it became clear that if allowed to follow its own glacial pace, the city would not get around to actually condemning the land for several years. The court found these precondemnation proceedings to be so damaging to the landowner that they were tantamount to a taking. It therefore granted the landowner's request for payment on a theory of inverse condemnation.

[60] In Selby Realty v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 779 (1973), the California Supreme Court rejected the use of inverse condemnation in such circumstances, reasoning that subjecting local governments to actions based on their general plans is both unnecessary and unwise. In distinguishing *Selby* from *Klopping, discussed in* note 59, *supra*, the court said that "[t]he adoption of a general plan is several leagues short of a firm declaration of an intent to condemn property." 10 Cal. 3d at 119, 514 P.2d at 117, 109 Cal. Rptr. at 805. The court then stressed the support accorded to community planning. "The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer." *Id.* at 120, 514 P.2d at 117, 109 Cal. Rptr. at 805. Thus, as a general limitation, local governments should be wary of committing themselves to park acquisition until their ability to proceed with a condemnation action is assured. As *Klopping* illustrates, false starts and precondemnation delays can subject open space holding zones to invalidity or trigger inverse condemnation liability.

[61] *See* note 59 *supra*.

[62] *Id.*

[63] *See* note 60 *supra*.

[64] Selby Realty v. City of San Buenaventura, 10 Cal. 3d 110, 119, 514 P.2d 111, 117, 109 Cal. Rptr. 779, 805 (1973).

[65] In HFH Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal.

The *Rancho La Costa*[66] court examined the county's regulatory activity in light of these precondemnation and plan designation cases. It found that no taking resulted from the county's actions.[67] In doing so, the court constructed a useful analytical framework for deciding regulatory taking cases: The greater the similarity between regulation and precondemnation conduct, the greater the likelihood a taking has occurred; the more regulation resembles plan designation activity, the less likely that a taking has occurred.[68] This framework may also provide local governments with useful benchmarks for defining the boundaries within which they may regulate.

Difficulties persist nonetheless in determining just where California courts draw the line dividing a valid regulation from a regulatory taking. Three factors contribute toward this difficulty. First, most cases decided by California courts have upheld disputed land use regulations.[69] Second, an analytical approach like that presented in *Rancho La Costa* cannot substitute for firm standards. So long as *ad hoc* decision-making exists as the basis for California taking law, fundamental inconsistencies will remain unresolved.[70] Third; taking cases decided under Califor-

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Rptr. 365 (1975), the California Supreme Court held that a landowner has no vested right to a previous zoning classification. In that case the plaintiff had acquired undeveloped agricultural land in the City of Cerritos with the intention of constructing a shopping center as permitted under the then existing zoning regulations. Later, the land was rezoned to permit only single family residences. The landowner claimed to have a right either to develop the land as a shopping center or to receive damages for the reduction in land value caused by the rezoning. The Court upheld the zoning and denied the landowner's inverse condemnation claim.

[66] Rancho La Costa v. County of San Diego, 111 Cal. App. 3d 54, 66, 168 Cal. Rptr. 491, 497 (4th Dist. 1980).

[67] *Id.*

[68] *Id.* at 60-61, 168 Cal. Rptr. at 494.

[69] For an excellent review of major California decisions concerning regulatory takings in which the courts uphold disputed ordinances, see Cunningham, *Inverse Condemnation as a Remedy for Regulatory Takings*, 8 HASTINGS CONST. L.Q. 517, 521-32 (1981) [hereinafter cited is Cunningham].

[70] For example, California courts have held it impermissible to restrict land to open space uses in a manner which leaves no economic use of the land. *See* text accompanying note 56 *supra*. *But see* Consolidated Rock Prods. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 628 (1962). In that case the only apparent use of the land in question was as a sand and gravel quarry. As zoned, however, the land was restricted to riding stables, golf courses, and similar open space uses. Although the effect of this regulation was

nia law may still be reviewed under the uncertain federal standards.[71]

There exists another, more serious problem associated with the respective federal and California approaches to the regulatory taking issue. The presence of these differing approaches, *ipso facto*, encourages litigants to forum shop. Competent counsel will choose to litigate a client-landowner's claim in the forum presenting the greatest likelihood of success. One factor in this determination[72] will undoubtedly be the court's approach to the regulatory taking issue.

However, forum shopping by litigants would persist even if state and federal courts were uniform in their approach to deciding regulatory taking cases, because California and federal courts offer claimants dramatically different remedies for excessive regulation. Landowners seeking the monetary remedy of inverse condemnation must turn to the federal courts.[73] California's judiciary provides only the remedy of ordinance invalidation.[74] The availability of these various approaches and remedies permits claimants to select an appropriate forum in which to bring suit while placing public counsel in the difficult position of having to anticipate the outcome of litigation grounded upon alternative standards and penalties.

II. California and Federal Remedies for Regulatory Takings

A. California's Ordinance Invalidation Remedy

The California Supreme Court recently curtailed the availability of the money damage remedy of inverse condemnation for regulatory takings. In *Agins v. City of Tiburon*,[75] the court re-

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to render the land substantially worthless, the California Supreme Court found it valid on the ground that quarrying would increase air pollution in the area.

[71] *See* text accompanying notes 37-52 *supra*.

[72] Other factors that will enter into the choice of forum decision include "the selection of appropriate jurisdictional bases, the doctrine of abstention, and various other peculiarities of federal practice." Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, Inst. on Planning, Zoning, and Eminent Domain 177, 209-10 (1980).

[73] *See* text accompanying notes 105-112 *infra*.

[74] *See* text accompanying notes 75-104 *infra*.

[75] 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980). Plaintiffs owned five acres of unimproved land in the City of Tiburon.

fused to award compensation to aggrieved landowners who alleged that an open space ordinance effected a taking of their property.[76] Under what has become the accepted view of the decision,[77] the court held that landowners who maintain that a zoning ordinance has unconstitutionally deprived them of "substantially all reasonable use"[78] of their land are limited to obtaining judicial invalidation of the ordinance through a writ of mandamus.[79] Aggrieved landowners, said the court, may not elect to sue in inverse condemnation and transmute an excessive use of police power into a compensable taking.[80]

Although this interpretation of *Agins* has gained wide acceptance,[81] it is nonetheless suspect. A basic tenet of legal analysis

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In 1973, the City passed a zoning ordinance designating the plaintiff's property as a "residential planned development and open space zone." This meant plaintiffs could build a maximum of five single-family dwellings or a minimum of one.

In 1975, plaintiffs filed an inverse condemnation claim with the City in the amount of $2 million. They alleged that the adoption of the ordinance completely destroyed the value of their property. The City rejected the claim and the plaintiffs filed a complaint alleging two causes of action. The first cause of action was a claim for $2 million in inverse condemnation. The second was a request for declaratory relief, asserting that the ordinance was unconstitutional because it effected a taking of their property without payment of just compensation. The City demurred to both causes of action. After failing to amend their pleadings, plaintiffs appealed to the California Supreme Court.

[76] The California Supreme Court stated, "We hold a zoning ordinance may be unconstitutional and subject to invalidation [by a writ of mandamus] only when its effect is to deprive the landowner of substantially all reasonable use of his property." Agins v. City of Tiburon, 24 Cal. 3d 266, 277, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 378 (1979), *aff'd*, 447 U.S. 255 (1980).

[77] *See* text accompanying notes 81-83 *infra*.

[78] *See* note 76 *supra*. Although this is a frequently stated version of California rule, *see* note 81 *infra*, no California Supreme Court case in recent decades has invalidated a regulation on that ground.

[79] *See* note 76 *supra*.

[80] Agins v. City of Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd*, 447 U.S. 255 (1980). In so stating, the court noted that appropriating funds to finance land acquisition is a legislative, not a judicial function. The court's job is to protect landowners from excessive regulation. The best way to do that, the court said, is by invalidating excessive regulations, rather than by forcing government to buy the land. 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377.

[81] An encyclopedic article on California land use case law says that the state decision in *Agins* makes clear that "a harsh zoning regulation can never be the basis for an inverse condemnaton award." DiMento *et al., Land Development and Environmental Control in the California Supreme Court: The Deferen-*

states that no court may speak with authority when it exceeds the facts of the case before it.[82] In *Agins*, the California Supreme Court overcame the plaintiffs' inverse condemnation claim by taking judicial notice of the city's open space ordinance. The ordinance permitted construction of up to five dwellings on the subject parcel. Finding that the landowners could use their parcel for residential development purposes, the court sustained the city's demurrer to the inverse condemnation claim. Having found no taking, however, the California Supreme Court could issue no true holding regarding the remedies available when a regulatory taking does occur.

Such an analysis might have been important in the United States Supreme Court's review of *Agins*.[83] However, this analysis never arose because the Court agreed that the ordinance, on its face, did not effect a taking.[84] Noting that the plaintiffs failed to apply to the city for development plan approval, the Court said that such a failure to exhaust administrative remedies[85] precluded plaintiffs from maintaining that a controversy existed concerning application of the ordinance to them.[86] Thus, the sole

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tial, The Preservationist, and The Preservationist-Erratic Eras, 27 U.C.L.A. L. REV. 859, 1019 (1980). *See also* Bayerd, *Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations Into Gold*, 21 SANTA CLARA L. REV. 171, 190 (1981).

[82] *See generally* L. CARTER, REASON IN LAW 124-36 (1979); M. ROMBAUER, LEGAL PROBLEM SOLVING ch.2 (2d ed. 1973); K. LLEWELLYN, THE BRAMBLE BUSH 42-53 (1965).

[83] Agins v. City of Tiburon, 447 U.S. 255 (1980).

[84] *Id.* at 262-63.

[85] "Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy . . . ." *Id.* at 260.

[86] California has long followed a similar approach to the issue of exhaustion of administrative remedies in land use cases. In Bohn v. Watson, 130 Cal. App. 2d 24, 278 P.2d 454 (2d Dist. 1954), the court held that a party to an administrative proceeding was required to present all arguments, issues, and evidence to the administrative tribunal as a precondition to positing arguments on judicial review.

Several exceptions exist, however. First, if attempts at exhaustion would be futile, then a property owner is not required to exhaust an administrative remedy. Ogo Assocs. v. City of Torrance, 37 Cal. App. 3d 830, 112 Cal. Rptr. 76 (2d Dist. 1974) (property owner need not exhaust administrative remedies before seeking judicial review of a building moratorium and down-zoning that was initiated by the property owner's very application for a permit to build low-cost housing).

question before the Court was whether the mere enactment of the open space zoning ordinance constituted a taking.[87] The Court held that it did not.[88]

Land use lawyers were dismayed by the United States Supreme Court's failure to decide whether California could limit its regulatory taking remedy to ordinance invalidation. They hoped that the Court would resolve the issue in *San Diego Gas & Electric Co. v. City of San Diego.*[89]

The facts of *San Diego Gas & Electric* are similar to those of *Agins.*[90] The city designated plaintiff's parcel as open space park land in its general plan and slated it for future acquisition. A bond issue to purchase the parcel failed, and the City abandoned further acquisition attempts. The parcel remained designated for open space uses. The plaintiff brought an inverse condemnation action against the city that resulted in a trial court award of over $3 million.

In upholding the trial court, the California Court of Appeal waived the requirement that landowners must exhaust their administrative remedies before seeking a judicial determination.[91] The court could have dismissed the claim on the ground that, since the plaintiff never submitted a development proposal to the city, it failed to state a cause of action.[92] However, finding

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Second, a property owner need not exhaust administrative remedies if irreparable harm would result. *See, e.g.*, Greenblatt v. Munro, 161 Cal. App. 2d 596, 326 P.2d 929 (1st Dist. 1958) (party seeking exemption from exhaustion doctrine was faced with immediate loss of livelihood). Abelleira v. District Court, 17 Cal. 2d 280, 102 P.2d 942 (1941) suggests that this exception will only apply to a party faced with the potential of immediately losing constitutionally vested rights.

Finally, an exception may exist where public rights are involved. *See* Environmental Law Fund v. Town of Corte Madera, 40 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1st Dist. 1975) (public not party to administrative proceeding and thus not required to exhaust administrative remedies). *See also* Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) (party contesting approval of a subdivision may not be barred by failure to exhaust administrative remedies where notice not received nor an opportunity to be heard given).

[87] Agins v. City of Tiburon, 447 U.S. 255, 257 (1980).

[88] *Id.* at 259.

[89] 101 S. Ct. 1287 (1981).

[90] Agins v. City of Tiburon, 447 U.S. 255 (1980). *See* note 75 *supra.*

[91] *See* San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal. Rptr. 103, 113 (4th Dist. 1978) (unpublished opinion).

[92] *See* note 85 *supra.*

that submitting such a proposal would have been futile,[93] the Court of Appeal sustained the trial court's award.

The California Supreme Court vacated the Court of Appeal's judgment, and directed it to reconsider the case in light of the California Supreme Court's decision in *Agins*.[94] In an unpublished opinion,[95] the Court of Appeal reversed the trial court's award, but refused to invalidate the ordinance because of the plaintiff's failure to exhaust its administrative remedies.

The plaintiff then had four judicial options: 1) Retrying the case in mandamus; 2) submitting a development proposal, receiving a denial, and retrying the case in inverse condemnation; 3) appealing the Court of Appeal's decision to the California Supreme Court for a final resolution; or 4) appealing to the United States Supreme Court. The plaintiff selected the fourth option.[96]

The Court's treatment of the case disappointed the plaintiff and those awaiting a definitive opinion on the remedies issue. In a plurality opinion authored by Justice Blackmun,[97] the Court concluded that it lacked jurisdiction to consider the case because the state judgment was not yet final.[98]

Justice Brennan's vigorous dissent proved of greater import than the result reached by the majority. Justice Brennan[99] argued against the California rule of limiting landowners to an invalidation remedy.[100] Given that Justice Rehnquist concurred

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[93] *See* note 91 and accompanying text *supra*.

[94] *See* San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287, 1291-92 (1981).

[95] 4 Civ. No. 16277 (4th Dist. June 25, 1979).

[96] San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981).

[97] The Chief Justice, along with Justices White and Stevens joined in Justice Blackmun's opinion. Justice Rehnquist concurred in the result of the majority, but agreed with the minority on the remedies issue. *See* text accompanying notes 99-101 *infra*.

[98] San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287, 1294 (1981).

[99] Justices Stewart, Marshall, and Powell joined in Justice Brennan's dissent.

[100] In my 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.

San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287, 1304 (1981) (Brennan, J., dissenting).

with the dissent on the remedies issue,[101] the Court may soon overrule the California remedy limitation.[102] The Court will probably provide landowners with a remedy that provides ordinance invalidation plus interim damages for the period of regulatory taking.[103] This amounts to compensation based on the subject parcel's rental value when validly regulated, commencing from the time the government first imposed the invalid regulation and ending when replaced by a valid regulation.[104]

In the meanwhile, ordinance invalidation is the only means by which California courts will aid landowners burdened by regulatory excess. However, those seeking monetary relief may turn to the federal courts.

B. The Federal Inverse Condemnation Remedy: 42 U.S.C. § 1983

Unlike California's judiciary, the federal courts have not yet precluded granting money damages for regulatory takings. This is not to imply, however, that inverse condemnation under the fifth amendment's "just compensation" clause is an available federal remedy for regulatory takings. *San Diego Gas & Electric*[105] failed to resolve that issue. But there is another ground upon which a plaintiff might invoke federal jurisdiction and bring an action in inverse condemnation for excessive regulation.[106]

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[101] "If I were satisfied that this appeal was from a 'final judgment or decree' of the California Court of Appeal . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." *Id.* at 1294 (Rehnquist, J., concurring).

[102] At least one commentator agrees with this forecast. *See* Cunningham, *supra* note 69, at 534.

[103] *See* note 100 *supra.*

[104] *See generally* Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, 4 ZONING & PLAN. L. REP., (pts. 1-2) vol. 6 & 7 (June/July 1981).

[105] San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981); Cunningham, *supra* note 69, at 525 (no United States Supreme Court case holds regulation may be held valid and give rise to damages).

[106] Four grounds exist upon which a plaintiff may invoke federal jurisdiction to bring an action for money damages in inverse condemnation. First, federal jurisdiction may be invoked where a federal question must be decided. 28 U.S.C. § 1331 (1977). Second, the landowner may claim a direct violation of the United States Constitution. *See, e.g.*, Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1978). Third, diversity of citizenship may bring

Section 1983 of the Civil Rights Act of 1871[107] has emerged as an increasingly attractive means of bringing a federal inverse condemnation action. Three recent United States Supreme Court decisions form the basis for this attraction. First, the Court has held that local governments may incur monetary liability for section 1983 violations.[108] Second, the court has effectively stripped municipalities of the absolute[109] and qualified[110]

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a land use action within the jurisdiction of the federal courts. 28 U.S.C. § 1332 (1977). *See, e.g.*, William C. Haas & Co. v. City and County of San Francisco, 605 F.2d 117 (9th Cir. 1979). Fourth, the claimant may allege a violation of the Civil Rights Act of 1866. 28 U.S.C. § 1343 (1977). The substantive basis for such an action is 42 U.S.C. § 1983 (1976).

[107] 42 U.S.C. § 1983 (1976). Passed during the Reconstruction period by a northern-dominated Congress concerned that public officials would not respect the emancipated slaves' rights, § 1983 has evolved into a remedy of broad scope. A claimant must show (1) an action taken under color of state law, which (2) deprived the claimant of a federal statutory or Constitutional right. *See* Monell v. Department of Social Servs., 436 U.S. 658 (1978), *discussed in* note 108 *infra*. *See also* Bosselman & Bonder, *Potential Immunity of Land Use Control Systems from Civil Rights and Antitrust Liability*, 8 HASTINGS CONST. L.Q. 453, 456 (1981); Love, *Damages: A Remedy for Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979).

While no culpability requirement is set forth in the § 1983 *prima facie* case, commentators have argued that a § 1983 action is in tort, requiring proof of culpable conduct. *See, e.g.*, Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 U. CIN. L. REV. 45 (1977); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 13-22 (1974); Comment, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1204-17 (1977).

The Supreme Court has fueled the debate. *Compare* Monroe v. Pape, 365 U.S. 167, 171 (1976) (a § 1983 plaintiff need not establish that defendant acted with specific intent to deprive a person of a federal right) *with* Estell v. Gamble, 429 U.S. 97 (1976) (to state a claim of deprivation of an eighth amendment right to be free of cruel and unusual punishment, under § 1983 plaintiff must allege acts or omissions sufficiently harmful to evidence "deliberate indifference" to serious medical needs).

[108] In Monell v. Department of Social Servs., 436 U.S. 658 (1978), the United States Supreme Court held that a municipality is considered a "person" for § 1983 purposes. This decision partially overruled Monroe v. Pape, 365 U.S. 167 (1961), which held to the contrary. In *Monell*, the Court found that the legislative history of the Civil Rights Act demonstrated a congressional intent that local governments be included among the "persons" to which § 1983 applies. 436 U.S. at 690. Further, the Court found that such status subjected local governments to liability for all forms of official violations of federally protected rights.

[109] Before Monell v. Department of Social Servs., 436 U.S. 658 (1978), federal courts granted only injunctive or declaratory relief against unconstitu-

immunities that long shielded their treasuries from federal lawsuits.[111] Third, the Court has tacitly endorsed an extension of section 1983 to the regulatory taking context.[112] These develop-

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tional municipal regulations. *See, e.g.*, Mosher v. City of Phoenix, 287 U.S. 29 (1932); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709, 727 (D.N.J. 1976). The immunity doctrine barred the recovery of damages from municipal officials for their unconstitutional acts. *Monell* extinguished this absolute immunity. *See also* United States v. Johnson, 383 U.S. 169 (1966) (federal legislators immune from their legislative acts); Tenney v. Brandhove, 341 U.S. 367 (1951) (affirming lower federal court ruling that state legislative officials are immune from suit for their legislative acts).

[110] A critical question left open by Monell v. Department of Social Servs., 436 U.S. 658 (1978) was the availability of qualified immunity to local governments. Owen v. City of Independence, 445 U.S. 622 (1980) answered this question in the negative. The Court held that a municipality has no immunity from liability under § 1983 where the liability arises from its constitutional violations. In addition, a municipality may not assert the good faith of its officials as a defense to liability. *Id.* at 657.

The consequences of *Owen* have yet to be fully understood. The four dissenting justices stated that the *Owen* majority interpreted § 1983 "to impose strict liability on municipalities for constitutional violations." *Id.* at 658 (Powell, J., dissenting). At least one commentator has agreed. *See* Smith, Owen v. City of Independence: *Comment*, 32 LAND USE L. & ZONING DIG. 5 (June 1980).

[111] An argument may be made that a local official can raise eleventh amendment immunity to § 1983 actions when acting quasi-judicially, as when deliberating on use permits, variances, and other standard-based land use entitlements. *See* Butz v. Economou, 438 U.S. 478 (1978) (Court upheld immunity of Department of Agriculture officials acting quasi-judicially); Stump v. Sparkman, 435 U.S. 349 (1978) (Court recognized immunity of state judges acting in a judicial capacity). It would be a short extension of these cases to find local officials immune from suit in quasi-judicial land use disputes. *See generally* Bosselman & Bonder, *supra* note 107.

[112] In Lynch v. Household Fin., 405 U.S. 538 (1972), the Court ruled upon the general applicability of § 1983 to the vindication of property rights. The plaintiff had sought declaratory and injunctive relief under § 1983 in the District Court of Connecticut, challenging a law that had authorized a summary pre-judicial garnishment of her savings account. The District Court dismissed the complaint on the ground that "property" rights rather than "personal" rights were alleged, and such an allegation lacked a jurisdictonal basis under the Civil Rights Act. The Supreme Court reversed, holding that "Congress . . . clearly . . . intended to provide a federal judicial forum for the redress of wrongful deprivation of property by persons acting under color of state law." *Id.* at 542.

In *dictum* in Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), the United States Supreme Court endorsed the availability of an inverse condemnaton remedy in land use cases under § 1983. *Id.* at 399-400. The merits of the case dealt with eleventh amendment immunity for a bi-state

ments will undoubtedly serve to increase the volume of federal section 1983 actions involving land use regulations.[113]

It thus appears that the Court will soon have to determine whether to extend section 1983 to the regulatory taking context.[114] As such, the Court should be apprised of the impact this extension would have on open space planning in California.

C. The Impact of Section 1983 on Land Use Planning

Although plaintiffs may commence section 1983 actions in ei-

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agency and its officials and, as such, offers no precedent for sanctioning § 1983 relief in land use cases.

[113] Even before these recent United States Supreme Court developments, federal courts were experiencing an increase in § 1983 cases. In 1976, federal courts witnessed a 300% increase over that of 1970 for a total of 17,500 § 1983 actions. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. HART, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 149 (Supp. 1977).

[114] Lower federal courts have come extremely close to deciding the issue of § 1983 liability in land use cases. Fralin & Waldron v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979) was one of the first federal cases to consider a zoning challenge against a local government for monetary damages under § 1983. Plaintiff, a real estate development firm, sought monetary damages and injunctive relief under § 1983 on the ground that racially discriminatory considerations resulted in the County's delay in ruling on, and subsequent refusal of, a proposed low and moderate income housing project. The County filed a motion to dismiss the suit for damages.

In denying the motion to dismiss, the District Court held that "[s]ince it is the execution of the zoning laws, a function of the County, which has allegedly inflicted injury upon the plaintiff, the County is subject to suit under section 1983." 474 F. Supp. at 1321.

In Gorman Towers v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980), the issue of whether § 1983 afforded a money damage remedy to an architect and developer was raised and answered affirmatively. However, the merits of the case turned on the absolute immunity of municipal legislators, which the court held barred any personal liability.

In Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978), plaintiff brought a § 1983 suit in federal court after the Michigan Supreme Court ruled that a city's setback ordinance was an unconstitutional exercise of police power and invalidated the ordinance. The Sixth Circuit found that plaintiff had stated a valid cause of action under § 1983 and remanded the case to the trial court for a hearing on the amount of damages to be awarded. 579 F.2d at 392.

Thus, the Supreme Court will undoubtedly face the issue in the near future. The policy implications posed by an extension of § 1983 to regulatory taking cases provide strong impetus for the Court to consider carefully all of the consequences that an affirmative decision would bring. *See* text accompanying notes 115-124 *infra*. *See also* Carlisle, *The Evolution of Section 1983—Verdict In On Liability But Jury Out On Remedy*, 12 URB. LAW. 727 (1980).

ther state or federal court,[115] the California judiciary's restrictive view toward monetary relief for regulatory takings[116] will probably induce complaining landowners to seek federal relief.[117] In the absence of governmental immunities,[118] counties and cities will face enormous monetary liability[119] and perplexing federal regulatory taking standards.[120] These factors will undoubtedly deter local officials from risking their limited budgets[121] and political futures[122] for the sake of open space planning. Providing

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[115] Testa v. Katt, 330 U.S. 386 (1947).

[116] *See* notes 75-81 and accompanying text *supra.*

[117] In addition to a state's restrictive view of monetary damages, "the commonly held beliefs that federal courts are more vigilant protectors of federal rights than state courts, and that state courts are more open to political influence, will probably lead most section 1983 land use litigants to bring their actions in federal court." Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine,* 89 YALE L.J. 1134, 1139 [hereinafter cited as *Land Use Regulation*].

[118] *See* notes 109-110 *supra.*

[119] In their *amicus curiae* brief filed in the United States Supreme Court in City of Newport v. Fact Concerts, 101 S. Ct. 2748 (1981) (punitive damages unavailable for § 1983 violations), the National Institute of Municipal Law Officers (NIMLO) noted that $15 billion in § 1983 claims are pending before courts today. NIMLO estimated that punitive damages claims comprise 75% of the $15 billion. Given the holding in *City of Newport*, $5 billion represents a more accurate figure for viable § 1983 claims. *See* letter from John Dekker, NIMLO President 1980-81, to NIMLO Members, July 1, 1981 (copy on file in U.C. Davis Law Review office). *See also* San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981) ($3 million awarded by trial court and upheld by state appellate court); Rancho La Costa v. County of San Diego, 111 Cal. App. 3d 54, 168 Cal. Rptr. 491 (4th Dist. 1980), *discussed in* note 58, *supra* ($6 million awarded by trial court).

[120] *See* notes 37-48 and accompanying text *supra.*

[121] Proposition 13's total fiscal impact on local agencies will exceed seven billion dollars in revenue lossses. Such an estimate does not include reductions in federal revenue sharing ($45 million), loss of federal CETA monies ($500 million) and loss of federal and state funding that is contingent upon matching funds. IMPACT OF PROP. 13, *supra* note 8, at i.

[122] In the absence of immunity for good faith acts, local officials are threatened with loss of political livelihoods. In light of Owen v. City of Independence, 445 U.S. 622 (1980), *discussed in* note 110 *supra*, damages resulting from a deprivation of constitutional rights by a municipality are allocated to the public as a cost of government. Monetary awards may be so high that municipal services would be cut back. Consequently, local officials would be held in political disfavor by outraged citizens, raising the prospect that such officials would be voted out of office. *See* Goldberg & Meck, Owen v. City of Independence: *Comment*, 32 LAND USE L. & ZONING DIG. 9 (June 1980).

monetary relief for excessive regulation under section 1983 will thus lead toward increasing timidity in local planning[123] and growing federal involvement in local land use matters.[124]

D. A Critique of the Appropriateness of Providing a Section 1983 Remedy for Regulatory Takings

Four policy considerations militate against supplanting state judicial review of regulatory taking cases with federal review under section 1983. First, federal courts have less experience in dealing with land use cases than do state courts.[125] In fact, federal courts seldom consider land use matters,[126] and, until recently, the United States Supreme Court rarely decided such cases.[127] Second, federal judges are less familiar with local conditions than state judges. Since a court's familiarity with the regulated parcel plays a vital role in these cases,[128] state courts, which are generally closer in proximity to a subject parcel,[129] are

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[123] *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980). The California Supreme Court concludes that a money damage remedy "will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor or measures which are less stringent, more traditional, and fiscally safe." 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377, (quoting Hall, Eldridge v. City of Palo Alto: *Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1597 (1977)). *See also* Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799, (1973) (inverse condemnation for regulatory takings will cause community planning to "grind to a halt").

[124] *See* note 117 *supra*.

[125] Over 10,000 zoning cases had been decided in state courts as early as 1969. N. WILLIAMS, AMERICAN PLANNING LAW 557-58 (1975). No doubt many more cases have been decided since that year. *See Land Use Regulation, supra* note 117, at 1145 n.63. By contrast, as of January, 1980, approximately 150 land use cases had been decided in federal court. *Id.* Two federal courts have recognized that state courts possess greater experience in dealing with land use cases. *See* Kent Island Joint Venture v. Smith, 452 F. Supp. 455, 462 (D. Md. 1978); Stallworth v. City of Monroeville, 426 F. Supp. 236, 240 (S.D. Ala. 1976).

[126] *See generally* Ryckman, *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 CALIF. L. REV. 377 (1981).

[127] *See* note 2 *supra*.

[128] A court's familiarity with a parcel is important for two reasons: (a) for purposes of assessing investment interests; and (b) for purposes of determining viable regulatory alternatives. *Land Use Regulation, supra* note 117, at 1146.

[129] In California, a state court judge must reside in the district in which he serves. CAL. GOV'T CODE § 69502 (West 1976). A superior court is located in each of 58 California counties. In contrast, the federal district court is divided

better situated to decide taking cases.

As a third consideration, the availability of monetary relief under section 1983 will decrease the likelihood of vindicating legitimate taking claims. Courts are not blind to the social consequences of imposing such a remedy.[130] When a court must either impose a massive money judgment upon a local government already struggling with a diminishing public fisc[131] or uphold an ordinance financially burdensome to a few, the court will likely side with local government. On the other hand, if a court has the option of either invalidating or upholding a regulation, public finance considerations evaporate. A judge may then adjudicate the merits of a landowner's taking claim rather than its fiscal impact.[132]

Finally, litigation of land use cases under the Civil Rights Act presents two theoretical inconsistencies. The use of section 1983 to vindicate claims raising no taint of racial, ethnic, religious, or sexual discrimination is inconsistent with the Act's purpose. Congress implemented the Act to protect the personal liberties of citizens,[133] not their property interests. Accordingly, section 1983 review of an allegation that racial discrimination motivated a local government to deny low-income housing[134] seems consistent with the Act. But routine zoning matters not tainted with any affront to personal liberties should not receive identical re-

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into four large judicial districts, thereby diluting the familiarity a federal judge has with local geographic conditions. *See Land Use Regulation, supra* note 117, at 1146 n.65.

[130] *See* note 119 and accompanying text *supra.*

[131] *See* note 121 *supra.*

[132] Ordinance invalidation is also an available § 1983 remedy. Therefore, the choices outlined in the text are not the only choices a court may make. However, "where invalidation of harsh land use regulations, leaves the landowner with uncompensated losses caused by invalid regulations, it seems likely that the federal courts will award damages under the Act." Cunningham, *supra* note 69, at 541 (citing Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978), *discussed in* note 114 *supra*). The actual choice is thus between damages or validity.

[133] *See* Netter, *Municipal Liability Under Section 1983*: Monell v. Dept. of Social Servs., 32 LAND USE L. & ZONING DIG. 3 (Jan. 1980); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1153-54 (1977) (Civil Rights Act of 1871 enacted to remedy complicity of state and local officials in Ku Klux Klan terrorism against blacks and union members). *See also* note 107 *supra.*

[134] *See* Fralin & Waldron v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979).

view. In addition, placing land use litigants on an equal footing with civil rights plaintiffs obscures the need for courts to provide special protection for essential civil liberties. Moreover, typical land use litigants do not require such protection since a large body of state law exists to protect them.[135]

Because of these considerations, the United States Supreme Court should seriously consider proscribing the availability of monetary relief under section 1983 for garden-variety zoning disputes. A section 1983 money damage remedy, when coupled with uncertain federal and state standards, poses an undeniable threat to the future of open space planning.

III. The Need for Clarity and Proscription

The United States Supreme Court should make a salutory contribution to land use law in two ways. First, the Court should clarify the standards for what constitutes a regulatory taking under the fifth and fourteenth amendments. Second, the Court should entrust state courts with the task of formulating remedies for regulatory takings.

It may seem superficially anomalous to urge that federal courts stay out of land use litigation, while simultaneously berating the United States Supreme Court for failing to achieve order in this area. However, both federal and state taking standards govern land use regulations.[136] California's emerging approach to regulatory takings[137] provides at least a semblance of regulatory guidance,[138] while the federal standards do not.[139] Therefore, the federal standards must be clarified. Only the United States Supreme Court can do so.

Should the Court continue to concede an inability to develop any "set formula"[140] for regulatory takings, local governments should not be forced to bear the financial burden of this judicial impasse. Accordingly, the Court should delegate responsibility for fashioning regulatory taking remedies to state judiciaries.

Commentators have suggested that the Court invoke a federal

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[135] *See* note 125 *supra*.

[136] *See* note 16 *supra*.

[137] *See* notes 55-70 and accompanying text *supra*.

[138] *Id.*

[139] *See* notes 37-54 and accompanying text *supra*.

[140] Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

land use abstention policy to achieve delegation.[141] Under this policy, federal courts would abstain[142] from deciding land use cases, thereby allowing state courts to adjudicate such disputes. However, even if the Court implemented such a policy, federal courts would nevertheless be required to decide at least some land use disputes.[143] Monetary liability would thus remain a threat.

As an alternative to delegation, an administrative "notice" requirement has also been proposed, which requires aggrieved landowners to provide local government with notice of an imminent section 1983 claim.[144] Theoretically, the notice requirement would provide the regulatory body with time to assess the strength of the landowner's claim and respond appropriately. However, the Court has already held that a plaintiff need not exhaust state administrative remedies to present a valid cause of action under section 1983.[145] Moreover, assessing such a claim would require local governments to accomplish something the

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[141] *See* Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 512-15 (1981). *See generally Land Use Regulation, supra* note 117.

[142] In recent years, the federal courts have avoided a direct confrontation with state rules by invoking the abstention doctrine, refusing to decide issues of federal law until state law issues have been determined. *See, e.g.*, Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978), in which the Ninth Circuit abstained from deciding whether the City's building moratorium, inclusion of plaintiff's property in their open space plan, and the imposition of burdensome conditions in exchange for approval of plaintiff's road pavement constituted a taking. The court abstained for three reasons: (1) the complaint touched a sensitive area of social policy upon which the federal courts ought not enter unless no alternative exists; (2) terminating the constitutional claim was possible in state court; (3) the state law was undecided and the issue was unclear. *Id.* at 281. *See also* Canton v. Spokane School Dist. No. 81, 498 F.2d 840 (9th Cir. 1974), which provided the basis for the *Sederquist* court's analysis.

[143] "The 'virtually unflagging obligation,' Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976), of federal courts to decide cases properly before them precludes a categorical rule against federal adjudication of land use cases—particularly because most federal land use cases will arise as section 1983 actions." *Land Use Regulation, supra* note 117, at 1149-50.

[144] HANDLING LAND PLANNING AND ZONING MATTERS 96 (U. of Calif. Extension 1980).

[145] *See* Gibson v. Berryhill, 411 U.S. 564 (1973); Damico v. California, 389 U.S. 416 (1967). Note, however, that under Agins v. City of Tiburon, 447 U.S. 255 (1980), exhaustion of administrative remedies is required to raise the constitutional cause of action. *See* notes 85-88 and accompanying text *supra*.

United States Supreme Court has yet to achieve—distinguishing with certainty the line between valid regulation and invalid taking.[146]

True delegation of remedy formulation necessitates that the Court proscribe the extension of section 1983 to garden-variety zoning cases. No impediments preclude such proscription. Thus far, the Court has held only that a section 1983 money damage remedy is available for procedural due process violations.[147] Further, the Court has only tacitly approved the availability of inverse condemnation under section 1983.[148] Given the effect that extending section 1983 to ordinary zoning disputes would have on land use planning in California,[149] proscription is an efficient means of delegating to the states the responsibility for formulating remedies and, in turn, ensuring a future for open space planning.

CONCLUSION

Landowners and local governments are now in doubt about the standard that the United States Supreme Court will apply in its next open space regulatory taking case. They are in an even deeper quandary about the remedy the court will fashion should it find a regulation excessive. This pervasive doubt is as destructive as it is unnecessary. Guideposts clearer than "beware of disappointing landowners' legitimate investment-backed expectations" can be staked out in this swampy thicket. Even the California tests of validity, although lacking in precision, provide greater reliability than the "I know it when I see it" approach now employed by the United States Supreme Court.

As serious as this standard of validity issue seems, it appears less important than the question of what remedy the Court will provide landowners who are burdened by regulatory excess. Resolution of this issue encompasses only a few alternatives. The Court may entitle successful landowners to invalidation only,[150]

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[146] *See* notes 37-54 and accompanying text *supra*.

[147] *See* Carey v. Piphus, 435 U.S. 247 (1978); Mandelker, *supra* note 141, at 510-12.

[148] *See* note 112 *supra*.

[149] *See* notes 115-124 and accompanying text *supra*. In cases of egregious abuse of power, like precondemnation blight and physical invasion, money damages should remain available.

[150] *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr.

inverse condemnation,[151] or invalidation with temporary damages.[152] Rational minds have concluded that a temporary damages remedy would be superior to either full payment or invalidation.[153] Equally reasonable advocates have opted for invalidation.[154] This article has not furthered that debate so much as it has argued against the full market value remedy implicit in the section 1983 cases that have proliferated since *Owen v. City of Independence*.[155] We have argued that the Court should reserve the Civil Rights Act for the protection of civil rights that are otherwise unprotected, and not for overzealous zoning.[156]

Supplying a federal inverse condemnation remedy under section 1983 that is attractive to plaintiffs but not looked upon with favor by state courts[157] encourages aggrieved landowners to litigate in federal courts. This is unfortunate. Federal courts are often distant from the site of the controversy,[158] producing inconvenience for the parties and their witnesses. Federal judges are seldom knowledgeable about particular parcels or land use law in general.[159] Furthermore, the lawyers handling land use controversies are typically unfamiliar with federal procedure[160] and are thus less effective when litigating in federal courts.

State courts, on the other hand, are generally closer in proximity to the parcel in dispute.[161] State court judges are also relatively more knowledgeable and competent in land use law than

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372 (1979), *aff'd*, 447 U.S. 255 (1980); notes 75-76 and accompanying text *supra*.

[151] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); text accompanying notes 105-114 *supra*.

[152] *See* D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS (1978); notes 103-104 and accompanying text *supra*. *See also* Hernandez v. City of Lafayette, 643 F.2d 1188 (1981) (measure of damages in regulatory taking case will be an amount equal to just compensation for the value of the property during the period of the taking).

[153] *See, e.g.*, Duerksen & Mantell, *Interim Damages: A Remedy in Land Use Cases*, 33 LAND USE L. & ZONING DIG. 6 (Apr. 1981).

[154] *See, e.g.*, Girard, Agins: *A Step in the Right Direction*, 31 LAND USE L. & ZONING DIG. 3 (Sept. 1979).

[155] 445 U.S. 622 (1980). *See* note 110 *supra*.

[156] *See* text accompanying notes 133-135 *supra*.

[157] *See* notes 75-80 and accompanying text *supra*.

[158] *See* notes 125-129 and accompanying text *supra*.

[159] *Id.*

[160] *See* Kanner, *supra* note 72, at 210.

[161] *See* notes 125-129 and accompanying text *supra*.

are their federal counterparts.[162] Moreover, state courts have developed a panoply of doctrines for protecting property rights threatened by excessive land use controls.[163] State laws should thus be permitted to function within federally defined constitutional limits.

In dealing with the institution of property, we deal with one of society's elemental artifacts.[164] Because the economic machine of every society is fueled by the productive use of its land, no society can afford to leave its land's permissible use in doubt. Property rights are a public creation, but that is not an excuse for blurring their limits. Such haziness is the consequence of failing to delineate clearly the government's power to regulate land and the landowner's remedy once government exceeds that power. These are the twin failures of the United States Supreme Court. It is a sorry excuse to beg this question on grounds of difficulty, as the Court has permitted itself to do.[165]

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[162] *See* note 125 *supra.*

[163] *Id.*

[164] *See* Bowden, *Protecting Our Environment Through Legislation: Approaching a New Concept of Property,* 4 REAL EST. L.J. 165 (1975).

[165] *See* San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287, 1302 n.15 (1981) (Brennan, J., dissenting).