
ANARCHY REIGNS SUPREME

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INTRODUCTION

As W.C. Fields once noted, there comes a time when one must grasp the bull by the tail and face the situation.

Disregarding that practical advice, the United States Supreme Court—for the third time in five years—has found a way to not decide whether the constitutional just compensation guarantee requires government agencies to compensate property owners when regulations unreasonably restrict the use of private property.¹

*Williamson County Regional Planning Commn. v. Hamilton Bank*² takes its place in the pantheon of indecision, alongside *Agins v. City of Tiburon*³ and *San Diego Gas & Elec. Co. v. City of San Diego*,⁴ as demonstrating that those learned in the ways of the law can always find a

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1. The fifth amendment just compensation clause was incorporated long ago into the due process guarantee of the fourteenth amendment, thus extending it to state and local government agencies. See *Chicago B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226 (1897)

2. 105 S. Ct. 3108 (1985).

3. 447 U.S. 255 (1980).

4. 450 U.S. 621 (1981).

way to duck an issue. With all due respect, the *Hamilton Bank* non-decision is both bad law and bad government.

The issue before the Court was one of immediate importance to government agencies and to those who deal with them. The combined impact of heightened environmental concern, increasing need to preserve open space, and tight municipal budgets has led local government agencies to employ their best efforts to find ways to increase or preserve open space without buying property.⁵

Thus, severe restrictions of land use have become an increasingly used tool of local government.⁶ Nonetheless, governmental agencies enacting stringent land use restrictions, "environmental" groups urging such restrictions, and property owners feeling they are being compelled to give their land to the public, are living in a state of legal chaos. In effect, the parties have been playing a massive legal game of Russian roulette. "Environmentalists" have been urging radical restrictions on the right to use property, government agencies often have enacted such restrictions, and property owners have challenged these restrictions in court.

No one really knows the legal consequence of regulatory stultification. Government agencies have been pulling the trigger without knowing what ammunition, if any, is in the chambers. The possibilities range from no remedy to the following:

- invalidation of the regulation;
- invalidation of the regulation plus compensation for a temporary taking for the time the regulation was in effect; and
- compensation for a complete taking of the property.

Each possibility has its adherents. *Hamilton Bank* was capable of providing guidance so that this remedy issue, which has absorbed the intense attention of both courts and commentators,⁷ might at last be

5. See 5 N. WILLIAMS, *AMERICAN LAND PLANNING LAW*, § 158.12 at 411 (1985). Such mental gymnastics are usually termed "innovative" by their supporters. See, e.g., *Agin v. City of Tiburon*, 24 Cal. 3d 266, 276, 157 Cal. Rptr. 372, 377-78 (1979); Cunningham, *Introduction to Symposium: Constitutional Issues in Land Use Regulation*, 8 HASTINGS CONST. L.Q. 449, 450 (1981); Freedman, *Innovative Land Use Controls: Will the Petaluma Decision Limit Growth?*, 50 L.A. BAR BULL. 252 (1975); Comment, "Fair" is Fair: *Valuing the Regulatory Taking*, 15 U.C.D. L. REV. 741, 743 (1982).

6. See, e.g., Bosselman & Bonder, *Potential Immunity of Land Use Control Systems From Civil Rights and Antitrust Liability*, 8 HASTINGS CONST. L.Q. 453, 454 (1981).

7. A complete bibliography is far beyond the scope of this article. Some of the more noteworthy scholarly contributions are: B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973); D. HAGMAN & D. MISCZYNSKI, *WINDFALLS FOR WIPEOUTS: LAND VALUE*

resolved.

Land use issues are at least as important as any other issue before the Supreme Court, and land use decisions affect all of us in varying degrees. Whether one is a property owner who feels aggrieved by regulatory action, an "environmentalist"⁸ who feels that all vacant land should remain that way,⁹ a citizen whose taxes either support the litigational efforts of regulating entities or pay judgments entered against them, or one who pays for the increased cost of housing caused by excessive regulation,¹⁰ we are all affected. We need guidance. No one

CAPTURE AND COMPENSATION (1978); C. SIEMON, W. LARSEN & D. PORTER, VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS (1982); Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15 (1983); Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1976); Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 177 (1980); Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and The Police Power*, 74 YALE L.J. 36 (1964); Stoebeck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970); Waite, *Government Power and Private Property*, 16 CATH. U.L. REV. 283 (1967). The author's own earlier views may be seen in Berger, *The State's Police Power is not (Yet) the Power of a Police State*, 35 LAND USE L. & ZONING NO. 5 at 4 (1983); Berger, *To Regulate or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A.L. REV. (1975).

8. Opponents to development generally wrap their opposition in the robes of environmental protection, even though their actual motives are sometimes less lofty. As Professor Frieden stated:

By far the most frequent objections that growth opponents raise have to do with environmental impacts. These range from harm to wildlife to destruction of natural resources to increases in air pollution. Yet to label all protest as environmentalism would be a mistake. Many growth opponents use environmental arguments to mask other motives, such as fears of property tax increases or anxieties about keeping their community exclusive. Environmental rhetoric has become a valued currency for public debate, with much greater voter appeal than arguments that appear more narrowly self-interested. As a result, people who are not environmentalists in any sense often borrow it for their own purposes.

FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* 8 (1979). See also Hagman, *An Environmental Masquerade*, Los Angeles Times, June 14, 1981, at 25, pt. 8; Tucker, *Environmentalism and the Leisure Class*, Harpers, Dec. 1977, at 49.

9. Some "environmentalists" have been described as those who already own their homes in the mountains.

10. See *Report of the President's Commission on Housing* 177-83 (1982); Pulliam,

is served by the Supreme Court's repeated refusal to provide that guidance.

SUMMARY OF THE *HAMILTON BANK* FACTS

No purpose would be served by an excessively detailed statement of facts. The trial lasted fifteen days, resulting in more than two thousand pages of testimony by twenty-seven witnesses. A short summary will suffice to set the stage.

The story began in 1973 when the owner of 676 acres of vacant land in Williamson County, Tennessee, sought permission to develop a residential subdivision. Because of the hilly nature of the property, the owner proposed a "clustered" development, rather than a standard subdivision. In other words, instead of having lots of uniform size and shape, the owner wanted to group the homes together in clusters, thus leaving large areas of open space. In that way, the same number of homes would be built but, instead of each home having its own little piece of open space, the open space would be collected in common areas.¹¹ Of the 676 acres, 260 acres were to be open space, most of that in a golf course. To ensure that the open space would remain open, the county was given an open space easement in virtually all of the property, including the golf course, except the buildable lots.

The county approved the preliminary plat for 736 homes. When the plat was approved, it was known that it would take a decade or more to complete the development. Because of local limitations on the length of time a preliminary plat may continue to exist before final completion of the project, the preliminary plat was reapproved four times between 1973 and 1979.¹² During that time the owner spent three million dol-

Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform, 13 Sw. U.L. REV. 435 (1983).

11. For discussions of cluster developments, see 4 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, 71-43 (Supp. 1984); 2 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 47.01 at 212-13 (1974).

12. Such artificial time limits demonstrate some of the game-playing that occurs in land use planning. Many planners, politicians and academicians have wrung their hands for years, pleading for "good" planning which thoughtfully utilizes large areas of land. See, e.g., P. BLAKE, *GOD'S OWN JUNKYARD* (1964); E. EICHLER & M. KAPLAN, *THE COMMUNITY BUILDERS* (1967); P. GOODMAN & P. GOODMAN, *COMMUNITAS* (1947); W. SCHNEIDER, *BABYLON IS EVERYWHERE* (English Translation 1963). Yet the politicians continue to provide a framework in which such sensitivity becomes impossible. This case is a paradigm. The project was so substantial that everyone knew it would take more than a decade to complete properly. But the state's planning law required the preliminary plat to be replaced by a final plat, that is, the project must be

lars building the golf course and another half million dollars constructing water and sewer facilities. By 1980 212 homes had been constructed.

After the 1973 approval, the county passed additional, more stringent regulations. Nonetheless, up until 1979 each plat reapproval was based on the 1973 regulations, this being pursuant to county policy not to change rules in mid-project and to a grandfather clause in the new regulations which provided that plats approved earlier had a right to continue under the earlier regulations. There was also formal action by the county's legislative body exempting this project from post-1973 regulations.

All of that changed in 1979. The Planning Commission reversed its course and decided the plat thereafter would need to be evaluated by current regulations. This meant that, because of more restrictive density regulations passed after 1973, fewer homes could be built. Through formal administrative proceedings, the owner sought a return to the original understanding. The Planning Commission, however, refused to alter its stance. Thus, in 1980, the owner lost the undeveloped portion of the property, about 260 acres, through foreclosure,¹³ and Hamilton Bank became the owner of the undeveloped acreage.

Hamilton Bank was equally unsuccessful in changing the Planning Commission's mind, and the plat was disapproved again. Hamilton

ready for construction within one year or the preliminary plat would lapse. There was no way a final plat for this entire project rationally could have been completed within one year. See generally C. SIEMON, W. LARSON & D. PORTER, *supra* note 7; Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625 (1978); Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U. L. REV. 545 (1979); Hagman, *The Vesting Issue: The Rights of Fetal Development Vis A Vis the Abortions of Public Whimsy*, 7 ENV. L. 519 (1977).

If planners and politicians are serious, then the laws must permit sufficient time for design and development within a stable legal and regulatory framework.

13. A distressing, yet increasingly familiar pattern has developed wherein property is lost through foreclosure when planning delays disrupt the normal flow of funds. See, e.g., *Jacobson v. Tahoe Reg. Plan. Agency*, 566 F.2d 1353, 1366-67 (9th Cir. 1978); *Hollister Park Inv. Co. v. Goleta County Water Dist.*, 82 Cal. App. 3d 290, 147 Cal. Rptr. 91 (1978); *Orsetti v. Fremont*, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978); *Frisco Land & Mining Co. v. State*, 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (1977), *cert. denied*, 436 U.S. 918 (1978); *cf. County of Los Angeles v. Berk*, 26 Cal. 3d 201, 161 Cal. Rptr. 742, 605 P.2d 381 (1980); *Klopping v. City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972). See also Note, *Inverse Condemnation: Valuation of Compensation in Land Use Regulatory Cases*, 17 SUFFOLK U.L. REV. 621, 625 n.15 (1983).

Bank filed suit under the Civil Rights Act¹⁴ alleging that the property had been taken without providing either due process of law or just compensation.

At trial there was expert disagreement over the number of homes that could be built on the 260 acres under the new regulations. The number remaining to be built pursuant to the original approval was 476.¹⁵ The jury concluded that the new regulations would permit construction of only sixty-seven more homes.¹⁶ The jury also concluded that the county was estopped to require compliance with post-1973 regulations and that \$350,000 in damages were due for the temporary taking of the property while later regulations were enforced.¹⁷

The district judge vacated the damages on the theory that a temporary deprivation could not require constitutional compensation, but the court of appeals, by a two to one vote, reinstated them,¹⁸ thus setting the stage for the main event in Washington.

THE CHAOTIC STATE OF THE LAW

Before proceeding to the Court's analysis of the facts in *Hamilton Bank*, it is important that one have a proper feel for the state of the law leading up to this decision. Two decades ago, Professor Sax concluded that this area of law's predominant characteristic was its array of confusing and apparently incompatible results.¹⁹ The passage of time has only made the situation worse. Five years ago, just before the first Supreme Court refusal to decide the issue, Professor Kanner concluded that "[a] survey of the state law on this topic reveals an amorphous and irreconcilable body of decisions, each purporting to implement the constitutional protection against confiscation."²⁰

A sampling of various states' laws in the area illustrates Professor Kanner's conclusion. California,²¹ Arizona,²² and apparently Flor-

14. 42 U.S.C. § 1983 (1982).

15. *Hamilton Bank*, 105 S. Ct. at 3115 n.5.

16. *Id.* at 3115-16.

17. *Id.* at 3116.

18. *Hamilton Bank v. Williamson County Regional Planning Comm'n*, 729 F.2d 402 (6th Cir. 1984).

19. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964).

20. Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, INST. ON PLAN. ZONING & EMINENT DOMAIN 177, 180 (1980).

21. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 277, 157 Cal. Rptr. 372, 378, 598 P.2d 25, 31 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); *Aptos Seascope Corp. v.*

ida,²³ reject compensation as a remedy. They opt instead for invalidation as the only solution.²⁴ By contrast, Ohio,²⁵ Georgia,²⁶ Massachusetts,²⁷ and Rhode Island²⁸ reject invalidation, holding that compensation is the sole remedy. Other states have created a spectrum of remedial decision.²⁹ Six states, Colorado, Kansas, North Dakota, Oregon, Texas, and Washington, have announced that either compensation or invalidation may be appropriate, depending on the circumstances.³⁰ New York seems in a world of its own, which is not even internally consistent. It purports to hold that invalidation is the only remedy, unless there has been physical invasion or direct legal control of the property, or where the injury suffered is irreversible.³¹ Yet New York steadfastly has refused to compensate even for physical invasion³² or irreversible injury.³³ At the same time, New York has

County of Santa Cruz, 138 Cal. App. 3d 484, 493, 188 Cal. Rptr. 191, 195 (1982), *appeal dismissed*, 104 S. Ct. 53 (1983).

22. *Davis v. Pima County*, 121 Ariz. 343, 590 P. 2d 459 (Ct. App. 1978), *cert. denied*, 442 U.S. 942 (1979).

23. *Dade County v. Nat'l Bulk Carriers, Inc.*, 450 So. 2d 213 (Fla. 1984); *Grady v. Lee County*, 458 So. 2d 1211 (Fla. Dist. Ct. App. 1984). *But see* *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984); *Key Haven Assoc. Enter., Inc. v. Bd. of Trustees*, 427 So. 2d 153 (Fla. 1982).

24. Hawaii may also be in this camp. *See* *Allen v. Honolulu*, 58 Hawaii 432, 571 P. 2d 328 (1977) (reversing an award of damages for development costs lost after property was down-zoned).

25. *Village of Willoughby Hills v. Corrigan*, 29 Ohio St. 2d 39, 278 N.E. 2d 658, *cert. den. sub nom. Chongris v. Corrigan*, 409 U.S. 919 (1972).

26. *Clifton v. Berry*, 244 Ga. 78, 259 S.E. 2d 35 (Ga. 1979).

27. *Hamilton v. Conservation Comm'n*, 12 Mass. App. 359, 425 N.E. 2d 358 (Ct. App. 1981).

28. *Milardo v. Coastal Resources Management Council*, 434 A.2d 266, (R.I. 1981).

29. *See* *Kanner*, *supra* note 20, at 206-09.

30. *Hermanson v. Bd. of County Comm'rs*, 42 Colo. App. 154, 595 P.2d 694 (1979); *Ventures in Property I v. City of Wichita*, 255 Kan. 698, 594 P.2d 671 (1979); *Kraft v. Malone*, 313 N.W.2d 758 (N.D. 1981); *Seuss Builders v. Beaverton*, 294 Or. 254, 656 P.2d 306 (1983); *City of Austin v. Teague*, 570 S.W. 2d 389 (Tex. 1978); *Brazil v. City of Auburn*, 93 Wash. 2d 484, 610 P.2d 909 (1980). Minnesota has announced a preference for injunctive relief, but will permit damages where the injury is permanent or the regulation is enacted solely to protect a government project, for example, airport approach zoning. *See* *McShane v. City of Fairbault*, 292 N.W. 2d 253 (Minn. 1980).

31. *Fred F. French Inv. Co. v. City of New York*, 39 N.Y. 2d 587, 385 N.Y.S.2d 5, 350 N.E. 2d 381, *cert. denied and appeal dismissed*, 429 U.S. 990 (1976).

32. *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y. 2d 124, 440 N.Y.S. 2d 843, 423 N.E. 2d 320 (1981), *rev'd*, 458 U.S. 419 (1982); *New York Tel. Co. v. North Hempstead*, 41 N.Y. 2d 691, 395 N.Y.S. 2d 143, 363 N.E. 2d 694 (1977).

awarded damages for a temporary de facto taking effected by use-stultifying regulations.³⁴

All state constitutions prohibit the taking of private property for public use without the payment of just compensation, as does the United States Constitution.³⁵ Therefore, whether state courts purport to interpret state or federal constitutional provisions, the result should be the same. This makes the varying treatment between the states even more mystifying. Because they are applying identical constitutional precepts, the constitutional protection accorded citizens should not depend on the state in which they happen to live. There is a need for uniform legal treatment.³⁶

The Supreme Court has been reluctant to provide guidance in this field. Not since Justice Stewart candidly confessed his inability to define pornography,³⁷ has the Court so tiptoed around an issue. The Court repeatedly has refused even to define what a "taking" is, preferring to decide the issue on an ". . . ad hoc, factual . . ." basis.³⁸

The Supreme Court has not, however, been silent. The conceptual problem is that the Court's discussions have become so oracular over the years that they merely provide grist for scholarly disputation, and excuses for state and lower federal courts to do as they please.³⁹

33. *Charles v. Diamond*, 41 N.Y. 2d 318, 392 N.Y.S. 2d 594, 360 N.E. 2d 1295 (1977).

34. *Keystone Assoc. v. State*, 82 Misc. 2d 620, 371 N.Y.S. 2d 814 (Ct. Cl. 1975), *rev'd*, 55 App. Div. 2d 85, 389 N.Y.S. 2d 895 (1976), *rev'd and remanded*, 45 N.Y. 2d 894, 411 N.Y.S. 2d 8, 383 N.E. 2d 560 (1978).

35. See 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN*, § 6.01[3] (rev. 3d ed. 1983).

36. One would have presumed the issue settled no later than *Appomattox*. Cf. *Testa v. Katt*, 330 U.S. 386, 390-91 (1947); *Mondou v. New York, N.H. & H. R. R. Co.*, 223 U.S. 1, 57 (1912).

37. Justice Stewart's confession came with the now famous avowal that ". . . I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). At least when Justice Stewart made this confession, the Court was deciding a large number of cases on the issue, giving observers a pattern by which decisions could be made. Land use law lacks enough Supreme Court decisions to disclose such a pattern.

38. E.g., *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2878 (1984); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 (1979); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

39. This could, at one time, have been viewed as an illustration of the Supreme Court's preference for permitting thorough lower court disputation in search of consensus or, at least, the airing of all possible views. See generally, R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 269 n.32 (5th ed. 1978); Schaeffer, *Reducing Circuit Conflicts*, 69 A.B.A.J. 452, 454 (1982). The situation now, however, approaches abdica-

One prominent line of cases, generally ignored by those who advocate the position of regulatory agencies, builds on the hornbook proposition that, when examining a legislative enactment for constitutionality, the courts seek a construction that will render the enactment constitutional, rather than void.⁴⁰ The courts traditionally deal with construction of legislation that would be unconstitutional without providing compensation by simply construing the legislation as requiring compensation. Such a construction permits them to uphold, rather than invalidate, the legislation.

Hurley v. Kincaid,⁴¹ provides an example. In *Hurley*, the Supreme Court reversed an injunction against a threatened uncompensated taking of land. The Court's rationale combined the constitutional preference for upholding legislation with traditional precepts of equity jurisprudence.⁴² According to the Court, the only infirmity in the government's plan was its failure to compensate. Compensation, however, may be obtained through an inverse condemnation action.⁴³ Because there was an adequate legal remedy through inverse condemnation, and the legislation would be upheld if a provision for compensation could be inferred, injunctive relief, that is, invalidation, was not available.⁴⁴

tion of the duty to decide cases. See Kanner, *Comment*, 33 LAND USE LAW & ZONING DIG. No. 5 (1981). There will be no consensus. Competing views have been aired. There is a clear conflict among the federal courts of appeals on what constitutional law requires. The states are irreconcilably split. It is time for a definitive answer. *Id.* at 8.

40. *E.g.*, Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).

41. 285 U.S. 95 (1932).

42. *Id.* The Supreme Court repeatedly has linked concepts of equity and fairness to its interpretation of the constitutional just compensation guarantee. *E.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *United States v. Fuller*, 409 U.S. 488, 490 (1973); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 631 (1961); *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

43. As the Supreme Court reiterated in *Hamilton Bank*, the Constitution does not require compensation *before* the taking as long as there is some way to obtain compensation thereafter. 105 S. Ct. at 3121.

44. *Hamilton Bank* cited *Hurley* with approval. 105 S. Ct. at 3121. See also *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *San Diego Gas & Elec.*, 450 U.S. 621 (1981) (Brennan, J., dissenting); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1979); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *City of Fresno v. California*, 372 U.S. 627 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). See generally Kanner, *supra* note 20, at 197-206.

In 1984 the Supreme Court reconsidered, and reconfirmed this line of cases, flatly concluding that a property owner cannot seek equitable relief to enjoin an alleged taking of private property for a public use when the taking is duly authorized by law and the owner could bring suit for compensation against the sovereign after the taking.⁴⁵

Other cases have approved severe restrictions on the right to use property without requiring compensation.⁴⁶ While at least some of these cases may be explained by the theory that government regulation prevented the owner from inflicting harm on other persons,⁴⁷ additional cases fall outside the theory's parameters. This theory also fails to deal with the occasionally panoramic language about the need for regulation.⁴⁸ Still other cases have said that even a valid regulation may so far impinge on property rights that compensation is constitutionally compelled.⁴⁹

In its confusion over defining a taking, the Supreme Court has retreated recently to the standard "bundle of sticks" analogy used by generations of real property professors. Likening property ownership to a bundle of sticks, the Court has concluded that either taking one stick from the bundle⁵⁰ or taking a small slice of all sticks in the bundle⁵¹ can constitute a taking. But how big is a "stick?" The Court recently held that a regulation prohibiting the sale of eagle feathers took only a "strand" from the bundle, and thus was not a taking.⁵² Where is the line drawn between "strand" and "stick?" And how large must a "slice" be before its taking requires compensation? In one recent case, the Court noted that, "the constitutional protection afforded

45. *Ruckelshaus*, 104 S. Ct. 2862.

46. See *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

47. See, e.g., *Berger, To Regulate or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 *LOY. L.A.L. REV.* 253, 275-79 (1975).

48. E.g., *Ambler Realty Co.*, 272 U.S. at 386-87, 394-95; *Hadacheck*, 239 U.S. at 410.

49. E.g., *United States v. Security Industrial Park*, 459 U.S. 70, 75 (1982); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979).

50. *Ruckelshaus*, 104 S. Ct. 2862, 2878; *Kaiser Aetna v. U.S.* 444 U.S. 164, 179-80.

51. *Loretto*, 458 U.S. at 435.

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

to private property cannot depend solely on size.”⁵³ Whether something is a taking cannot be determined merely by whether the volume of space it occupies is “bigger than a breadbox.”⁵⁴

The second recent case in which the Supreme Court failed to resolve the remedy issue was *San Diego Gas & Elec. Co. v. City of San Diego*.⁵⁵ *San Diego Gas*' importance in the realm of land use is the Court's 4-1-4 split. Justice Blackmun's lead opinion said that the California judgment was not “final” for purposes of United States Supreme Court review and declined to reach the merits.⁵⁶ Justice Brennan's dissent, which also had four adherents, concluded that the judgment denying compensation was not only final, it was wrong.⁵⁷ What accentuates the case's impact is Justice Rehnquist's “swing” vote. Justice Rehnquist's concurring opinion gave Justice Blackmun's view a majority, but tantalizingly he noted that if the appeal was from a “final judgment or decree” of the California Court of Appeal, he would agree with much of Justice Brennan's dissenting opinion.⁵⁸ Even Justice Blackmun did not disagree with Justice Brennan's analysis of the merits. He noted that “. . . the federal constitutional aspects of that issue are not to be cast aside lightly.”⁵⁹ Thus, while no formal holding gathered a majority, it seemed possible that a message was being sent by a majority of the Court.⁶⁰ The message was summed up succinctly by Justice Brennan's pithy observation: “. . . if a policeman must know the Constitution, then why not a planner?”⁶¹

Justice Brennan's dissent dealt harshly with California's analysis, concluding that its rule that an arbitrary or excessive use of the police power can *never* constitute a taking was flatly contrary to prior United

53. *Loretto*, 458 U.S. at 435.

54. *Id.* at 438 n.16. *Cf.* *United States v. Sec. Indus. Bank*, 459 U.S. 70, 76 (1982) (bundle owned by lienholder may be smaller than bundle owned by fee owner, but taking of even a small bundle without compensation violates fifth amendment).

55. *San Diego Gas*, 450 U.S. 621.

56. *Id.* at 633.

57. *Id.* at 636.

58. *Id.* at 633-34.

59. *Id.* at 633.

60. *Compare*, Freilich, *Solving the Taking Equation: Making the Whole Equal the Sum of the Parts*, PRACTISING LAW INSTITUTE, EMINENT DOMAIN 403, 411 (1982), in which a prominent proponent of uncompensated regulation apparently argues that lawyers and judges ought not be permitted to add four dissenters to one Rehnquist to come up with a majority of five.

61. *San Diego Gas*, 450 U.S. at 661 n.26 (Brennan, J., dissenting).

States Supreme Court decisions.⁶² In determining the requisites for a taking, Justice Brennan hewed to reality, avoiding the siren song of those who call for some explicit litmus test like actual physical possession. He noted the "essential similarity" between regulatory and other takings⁶³ and concluded that police power regulations, such as zoning and other land use restrictions, could destroy a property owner's use and enjoyment for public benefit as easily and effectively as condemnation or actual physical invasion.⁶⁴

Having concluded that a regulation could effect a taking, Justice Brennan turned to the issue of the appropriate remedy. He rejected both the "all" approach of the property owner, which compels the city to buy the property, and the "nothing" approach of the city and California courts, where no damages could ever be appropriate. Justice Brennan opted for a middle ground, concluding that a regulatory taking might only be temporary. If the government chose to rescind the regulation rather than keep it in effect and buy the property, then the just compensation clause would be satisfied by the payment of compensation for the period of time the regulation was in effect.⁶⁵

The aftermath of *San Diego Gas* was not difficult to predict.⁶⁶ Lower courts began jumping on what appeared to be a bandwagon. Seven federal courts of appeal considered the issue, with six either expressly or impliedly acknowledging that Justice Brennan's dissent appeared to represent the Court's substantive views.⁶⁷ The lone holdout was the

62. *Id.* at 647.

63. *Id.*

64. *Id.* at 652. Justice Brennan noted that the property owner would be deprived of the beneficial use of his property whether the government condemned the land, flooded it or restricted it to use in its natural state. To the government, the public benefit of such alternatives may be equally great. *Id.*

65. *Id.* at 658-59.

66. As one observer noted:

When the best, most liberal Justice of the Burger Court's *San Diego* panel, joined on the substantive issue by the Court's most conservative member, derides the California Supreme Court for its parochial, muddled views on takings, inverse condemnation and the Constitution, more is at work than a mere dissertation on private property rights.

Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15, 94-95 (1983).

67. See *Hernandez v. Lafayette*, 643 F.2d 1188, 1199-1200 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *appeal filed*, 699 F.2d 734 (1983); *Hamilton Bank v. Williamson County Reg. Plan. Comm'n*, 729 F.2d 402, 408 (6th Cir. 1984), *rev'd on other grounds sub nom. Williamson County Reg. Plan. Comm'n. v. Hamilton Bank*, 105 S.

First Circuit which, because it had earlier opined that a regulation could not require compensation,⁶⁸ concluded that it would not change its position until the pronouncement from on high was more substantive than oracular.⁶⁹ Like the six federal circuits, state courts began adopting the Brennan approach.⁷⁰

The stage was set. When the Supreme Court granted certiorari in *Hamilton Bank*, observers looked forward to a conclusive decision. After all, *Hamilton Bank* had been tried on the merits. Unlike *Agins*, more than bare pleadings were before the Court. And unlike *San Diego Gas*, there was no potentially undecided, potentially dispositive issue remaining for trial. More importantly, the tentative solution of *San Diego Gas* had been run up the flagpole and all jurisdictions, save those that already had committed themselves to a contrary position,⁷¹ had saluted.

THE MOUNTAIN LABORED MIGHTILY AND BROUGHT FORTH A MOUSE

If, as in football parlance, a tie is like kissing your sister, the *Hamilton Bank* result is more like kissing your dog. You can be grateful that you did not get bitten, but the experience was not particularly pleasant.⁷²

Ct. 3108 (1985); *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 398 (6th Cir. 1984), 106 U.S. 455 (1985); *Barbian v. Panagis*, 694 F.2d 476, 482 n.5 (7th Cir. 1982); *Nemmers v. City of Dubuque*, 764 F.2d 502, 505 n.2 (8th Cir. 1985); *Bank of America v. Summerland County Water Dist.*, 767 F.2d 544, 547 (9th Cir. 1985); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 151; *In re Aircrash in Bali*, 684 F.2d 1301, 1311 n.7 (9th Cir. 1982); *Fountain v. Metro Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982).

68. *Pamel Corp. v. Puerto Rico Highway Auth.*, 621 F.2d 33 (1st Cir. 1980).

69. *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1983).

70. *Pratt v. State*, 309 N.W. 2d 767, 774 (Minn. 1981); *Burrows v. Keene*, 121 N.H. 590, 596, 432 A.2d 15, 20 (1981); *Ripley v. Lincoln*, 330 N.W. 2d 505, 510 (N.D. 1983); *Anniceli v. South Kingston*, 463 A.2d 135, 140 (R.I. 1983). *See also* *Pioneer Sand & Gravel v. Anchorage*, 627 P.2d 651 (Alaska 1981) (reserving judgment on proper remedy in light of *San Diego Gas*, but allowing inverse condemnation action to go to trial).

71. *See supra* notes 68-69. *See also* *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 188 Cal. Rptr. 191 (1982); *Agins v. Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

72. Of course, *Hamilton Bank* and the *Williamson County Regional Planning Commission* were involved a bit more directly than the rest of us. The Commission had a \$350,000 judgment lifted from its back and *Hamilton Bank* was told to jump through a

For the third time in five years, the troops had been assembled and the arguments exhaustively presented to the Court by counsel for the parties and numerous amici curiae. After three arguments on the same issue in a short period of time, the Supreme Court should have been up to the task. Indeed, one would have thought that the Court would be anxious to resolve this problem and remove such cases from the crowded docket.

With a hushed expectancy, government agencies, property owners, and environmental groups waited. Not since those three oriental kings followed a bright star in the East had the dramatis personae so anticipated a birth.

And then nothing happened. Again.

Well, what did happen? And how? And why?

At bottom, of course, the Supreme Court announced that, although it had granted certiorari “. . . to address the question whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been ‘taken’ temporarily by the application of government regulations . . .”⁷³ the answer “[o]nce again . . . must be left for another day.”⁷⁴

With the suspense ended early in the opinion, the Court gave two reasons for concluding that the decision was not sufficiently final for its consideration. First, Hamilton Bank had not obtained a “final” decision by the Planning Commission regarding development of its property.⁷⁵ After all, said the Court, whether a taking occurred depends on the economic impact of the governmental action and the extent of its interference with reasonable investment-backed expectations, and such

few more hoops before filing suit and starting all over again. Actually, the Commission's insurance company prevailed in the case. The Commission was insured and would not have paid the judgment in any event. Perhaps the fact that the appeal was handled by the insurance company explains why the only issue raised on appeal was the propriety of monetary damages. See *infra* note 77.

73. *Hamilton Bank*, 105 S. Ct. 116.

74. *Id.* One is, of course, compelled to question the Supreme Court's method of reviewing petitions before granting review. After all, the answer to this question had been a reason for granting review in both *Agins* and *San Diego Gas*. See *San Diego Gas*, 450 U.S. at 623. If the issue was not reviewable in any of these cases, the Court should have realized it before such an extravagant use of Court and lawyer time, particularly when some of the Justices repeatedly complain about the size of their workload. See 5 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 158.12 at 416 n.32 (1985). Alternatively, if the problem was so well-hidden that it took full, plenary review to find it, it would have been prudent for the Court to simply decide the issue.

75. *Hamilton Bank*, 105 S. Ct. at 3119.

a question can be evaluated only after the administrative agency has reached a final position regarding its application of the regulations at issue to the particular land in question.⁷⁶ In other words, the issues were not ripe after all. Hamilton Bank did not have a final administrative determination.

This plausible sounding rationalization must have come as quite a shock to the participants. While the logic of requiring some definitive word from the agency hardly can be disputed, no one was in doubt as to the Planning Commission's position.⁷⁷

In a nutshell, the evidence showed that in 1979, six years after approval of the preliminary plat, after the dedication of an open space easement to the county, and after construction of the golf course and utilities to serve the entire proposed development, the Planning Commission decided to call a general halt to development and implement a "no-growth" policy. The policy applied to projects already under construction as well as to new proposals.

The Planning Commission determined that the easiest way to effectuate the no-growth policy as to projects already in process was simply to apply the new standards to them, notwithstanding agreements, approvals and understandings to the contrary.

Hamilton Bank appealed to the Board of Zoning Appeals, which concluded that the project was entitled to be judged by 1973 standards. The Planning Commission refused to acknowledge that decision. The County Attorney advised Hamilton Bank that any further resort to the Board of Zoning Appeals would be futile, as the Planning Commission would ignore its determination. Thus, the situation facing Hamilton Bank was that the agency which held the power of life and death over the project decided on death.

The Supreme Court's solution? Hamilton Bank should have asked the Planning Commission—the very entity that had decided to block

76. 105 S. Ct. at 3119.

77. This factual analysis presumes that the issue was properly before the Court. It may not have been. Recall that the trier of fact found that the Planning Commission was required to apply 1973 regulations to the project and that it wrongfully had refused to do so. Not only did the Planning Commission not appeal from this portion of the judgment (rendering it long since final), but the parties reached an agreement implementing this part of the judgment while the appeal was pending. *Hamilton Bank*, 105 S. Ct. at 3115. Thus, on appeal the only issue was Hamilton Bank's entitlement to damages for the period during which the Planning Commission wrongly enforced the post-1973 regulations. All other issues were procedurally foreclosed. *Cf. Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977).

the project by reneging on its agreement to evaluate the project by 1973 standards and that refused to acknowledge a determination by the Board of Zoning Appeals to abide by its 1973 agreement—to grant a variance from the later regulations so the project could go forward.⁷⁸

The mind fairly boggles. In no other field of law does the Court require a party to go hat in hand to the very entity that is denying its right and ask it to please mend its ways. Indeed, the Court usually disposes of such suggestions of futile action in brief opinions, often per curiam, and sometimes even in footnotes.⁷⁹

Government agencies will have a field day with this decision. How does one finally ripen a case so the Supreme Court will decide it? Decisions like this enable ingenious government counsel to dream up ways to add new levels of decisionmaking to the process in an effort to prevent decisions from ever appearing final.⁸⁰

Nor need one rely on the word of a property owner's advocate. In *San Diego Gas* Justice Brennan exposed one game routinely employed by government agencies trying to control the development field. The game involves simply changing the rules until one of them works.⁸¹

78. *Hamilton Bank*, 105 S. Ct. at 3118-19. The Court's conclusion that variances also should have been sought from the Board of Zoning Appeals is difficult to fathom. That Board already had decided that the standards to apply were the 1973 standards. Under those standards, the preliminary plat already had been reappraised four times between 1973 and 1979.

79. *E.g.*, *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330-31 (1969) (discrimination by labor union against its own members); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (denying law book use to prison inmate); *King v. Smith*, 392 U.S. 309, 312 n.4 (1968) (denial of AFDC benefits). In each case, there was an available administrative avenue which, if pursued, theoretically could have yielded the relief sought. The Court lost no time in explaining that there was no requirement to seek theoretically available, but pragmatically futile, relief before filing suit. Federal trial courts consistently have refused to require futile administrative action in land use cases. *Sanfilippo v. County of Santa Cruz*, 415 F. Supp. 1340, 1344 (N.D. Cal. 1976); *Kopetzke v. County of San Mateo*, 396 F. Supp. 1004, 1007 (N.D. Cal. 1975); *Dahl v. City of Palo Alto*, 372 F. Supp. 647, 649 (N.D. Cal. 1974); *Cordeco Dev. Corp. v. Vazques*, 354 F. Supp. 1358 (D.P.R. 1972); *Steel Hill Dev., Inc. v. Town of Sanbornton*, 335 F. Supp. 947, 949 (D.N.H. 1971); *Inmobiliaria Borinquen, Inc. v. Garcia Santiago*, 295 F. Supp. 203, 206 (D.P.R. 1969); *Lerner v. Town of Islip*, 272 F. Supp. 664, 668 (E.D.N.Y. 1967).

80. *Compare Kanner, Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 U. DET. J. URB. L. (1975). Administrative processes can consume large amounts of time. Adding new layers of action only increases the delay and damage suffered by property owners.

81. Justice Brennan cited advice given local government attorneys at the 1974 annual Conference of the National Institute of Municipal Law Officers in California. As the advice went, even if the city were to take legal preventative maintenance but still lose a case, precedent allows the city to alter its regulations and start the process over

Another favorite local government game has been to take the position that when they turn down a project, they are not denying *all* use, but merely the specific project proposed. Come back with another, they say, and we will evaluate it on its merits. Just look at our zoning ordinance, they say, it permits lots of (theoretical) uses. Try them on us. One at a time Other agencies take the position that even rejected plans may be re-submitted after the passage of an appropriate time period. They thus urge that there *never* is a "final" rejection.

Applying *Hamilton Bank* to these types of government devices means there can never be, in the Supreme Court's words, ". . . a final decision regarding how [the property owner] will be allowed to develop its property."⁸² In addition, that is, of course, the way planning agencies operate. The Supreme Court's opinion is out of touch with the real world. Planning commissions do not make it their business to tell property owner's specifically how they will be allowed to develop their property.⁸³ Rather, since facial attacks on land use ordinances generally have been disallowed,⁸⁴ all that can be achieved is case-by-case, application-by-application, determinations. Only in the rarest case will there be only one possible use, with that use then being turned down cold.⁸⁵ In general, government entities will be able to assert that other economically viable uses are possible.⁸⁶ With the *Hamilton Bank* pre-

again. 450 U.S. at 622 n.22 (citing Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO MUNICIPAL L. REV. 192-93 (1975)). See also R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED*, 1, 288 (1985).

82. *Hamilton Bank*, 105 S. Ct. at 3119.

83. *But cf.* *Spears v. Berle*, 48 N.Y. 2d 254, 397 N.E. 2d 1304 (1979). In *Spears* the court held that when litigating whether denial of a permit prevented all viable use, the Commissioner of Environmental Conservation had to tell the property owner what uses he deemed both permissible and viable. Note that this disclosure does not come about until litigation ensues.

84. *Hamilton Bank*, 105 S. Ct. at 3116-17; *Agins v. City of Tiburon*, 447 U.S. 255, 260-64 (1980).

85. Such situations will, of course, arise. *Hamilton Bank* seems to be one.

86. See, e.g., *Gilliland v. County of Los Angeles*, 126 Cal. App. 3d 610, 616, 179 Cal. Rptr. 73, 77 (1981). There, the property was located across the street from a runway at an air force base. In holding that agricultural zoning did not work a taking of the property, the Court relied on uses theoretically permitted by the zoning ordinance. The case was decided on the pleadings, however, with the Court never reaching the merits. The Court ignored the complaint's allegation that the theoretically permitted uses were a sham.

If permitted to go to trial, the sham could have been proved. For example, the following potential uses are unrealistic—rendering the property not economically viable—because of the high noise levels and danger from aircraft crashes: one-family dwellings;

cept on the books, look for such claims to multiply geometrically.

The *Hamilton Bank* Court added another roadblock to filing suits in federal courts: exhaustion of state *judicial* remedies. According to the Court, if the state permits an inverse condemnation action for damages resulting from overregulation, such a suit must be filed as a precondition to a federal suit.⁸⁷ A constitutional violation does not occur, reasoned the Court, unless a taking is effected without just compensation. It cannot be known whether the state has countenanced such an uncompensated taking until after resort to the state courts.⁸⁸

Once again, while there is a seeming symmetry to this argument, it is contrary to settled teachings of the Supreme Court in other contexts. The Court long has recognized the rule that the existence of an unused state remedy does not preclude federal court consideration of federal constitutional violations.⁸⁹

Moreover, the issue is not whether a state has countenanced the constitutional violation, but whether the particular defendant has committed it. The Civil Rights Act does not bar states from maintaining systems of jurisprudence that deny federal rights. Rather, it forbids any person acting under color of state law from violating rights secured by federal law. When a planning commission prohibits viable economic use of property without any pretext of compensation, it has violated the Civil Rights Act. The presence or absence of a state remedy has no bearing on whether the malefactor has done the deed.

In the past, the Court has rejected this concept. The Court has found it immaterial to stating a federal claim that a person's conduct is legal or illegal according to state law.⁹⁰ Such claims are entitled to be

animal hospitals, schools, kennels and veterinary offices; youth camps and other campgrounds; auction grounds; stock breeding facilities and stockyards; riding academies and stables. The adverse impact of aircraft noise on animals is legendary. *See, e.g.,* *United States v. Causby*, 328 U.S. 256 (1946) (chickens); *Dahlstrom v. United States*, 228 F. 2d 819 (8th Cir. 1956) (horses); *Wildwood Mink Ranch v. United States*, 218 F. Supp. 67 (D. Minn. 1963) (minks); *Sawyer v. United States*, 148 F. Supp. 877 (M.D. Ga. 1956) (mules). As for agricultural uses, another court already had noted the unsuitability of this area for agriculture. *Stone v. City of Los Angeles*, 51 Cal. App. 3d 987, 992, 124 Cal. Rptr. 822 (1975).

87. *Hamilton Bank*, 105 S. Ct. at 3121-22.

88. *Id.* at 3121 n.13.

89. *See, e.g.,* *Monroe v. Pape*, 365 U.S. 167 (1961); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913). *See also* *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 194 (1959) (state eminent domain cases routinely tried in federal court).

90. *See* *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963).

adjudicated in federal court.⁹¹

This theory of protecting federal rights in federal courts dates to the founding of the United States. As James Madison bluntly put it, “. . . a review of the constitution of the courts in the many states will satisfy us that they cannot be trusted with the execution of federal laws.”⁹² The Supreme Court itself has noted that one reason for adopting the Civil Rights Act was to provide a federal forum without recourse to state litigation.⁹³ The Court’s analysis of the reasons for abandoning *sub silentio* this settled precept is less than satisfactory.

As the basis for its decision, the Court analogized *Hamilton Bank* to two other types of cases: inverse condemnation cases against the federal government and Civil Rights Act cases involving random and unauthorized torts.

The federal inverse condemnation discussion is bewildering. The Court concludes that “. . . we have held that taking claims against the Federal Government are *premature* until the property owner has availed itself of the process provided by the Tucker Act [that is, suit in the United States Claims Court]”⁹⁴

The Court cannot have meant what it said. The clear implication is that suit in the Claims Court is some kind of precondition to suit in district court; that is, one *can* sue the United States for a taking in district court, but only after resort to the Claims Court has proved unavailing.

No statement of the law could be further from the truth. The

91. See generally 1A J. MOORE, W. TAGGART & J. WICKER, *MOORE’S FEDERAL PRACTICE* ¶ 0.201, at 2021-22 (2d ed. 1981). Paragraph 0.201 reads in part:

The fact that state courts afford a remedy will not in itself prevent recourse to the federal courts in cases over which they have jurisdiction. Barring exceptional circumstances, and subject to express federal statutory restrictions, a party may normally resort to a federal court without having first exhausted the judicial remedies of the state courts.

Id.

92. Quoted in *Greenwood v. Peacock*, 384 U.S. 808, 836 (Douglas, J., dissenting) (1966). See also *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816); *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

93. See *Monroe v. Pape*, 365 U.S. 167 (1961). The Court stated that:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal court because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by the state agency.

Id. at 180. See also *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 500-06 (1982).

94. *Hamilton Bank*, 105 S. Ct. at 3121 (emphasis added).

Claims Court is not a way station. It is the *only* court with jurisdiction over inverse condemnation claims against the United States in excess of \$10,000. The Tucker Act⁹⁵ provides that court with such jurisdiction.⁹⁶ Having jurisdiction, its ability to fashion a remedy is as comprehensive as the Constitution requires.⁹⁷ Use of the Tucker Act is not a *prerequisite* to another remedy, it *is* the remedy. When suit is filed in the Claims Court, that court will decide whether a taking has occurred and, if so, award compensation. The decision is *res judicata*.⁹⁸ The case then is concluded, not shifted to a different court for another trial. The Supreme court routinely reminds parties of the existence of the Claims Court for this purpose.⁹⁹ An inverse condemnation suit against the United States that seeks more than \$10,000 cannot be brought in a United States district court.¹⁰⁰

While the Court's reliance on the Tucker Act is mystifying, its reliance on *Parratt v. Taylor*¹⁰¹ as the other justification for its decision simply is misguided. In *Parratt*, the hobby materials of a Nebraska Penal and Correction Complex inmate were negligently lost while in official custody. The inmate filed an action in federal court, claiming a violation of his civil rights. Ultimately this dispute over a \$23.50 hobby kit resulted in five separate opinions by the Justices of the Supreme Court.

Parratt's facts overwhelmed the Court. Litigation is a favorite pastime of those enjoying compelled vacations at government expense, and there was simply no way the Court was going to invite every prisoner with a nickle and dime grievance to file a Civil Rights Act case. Thus, while the Court had no difficulty seeing a deprivation of property by a person acting under color of state law, Mr. Taylor was remitted to the state's tort system because of the random and unpredictable nature of the negligence.¹⁰² A scant year later, however, the Court in *Logan v.*

95. 28 U.S.C. § 1491 (1982).

96. *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980).

97. *Yearsley v. Ross Constr. Co.*, 309 U.S. 18, 22 (1940).

98. *See Garrigan v. Giese*, 553 F. 2d 35 (8th Cir. 1977); *Mathis v. Laird*, 457 F. 2d 926 (5th Cir. 1972), *cert. denied*, 409 U.S. 871 (1973).

99. *E.g.*, *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862-81 (1984); *Dames & Moore v. Regan*, 453 U.S. 654, 688-90 (1981); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 148 (1974).

100. *E.g.*, *United States v. Gregory*, 300 F. 2d 11, 13 (10th Cir. 1962); 6A P. NICHOLS, *THE LAW OF EMINENT DOMAIN*, § 29.1 at 29-7 to 29-8 (rev. 3d ed. 1981).

101. 451 U.S. 527 (1981). *See Hamilton Bank*, 105 S. Ct. at 3121-22.

102. The key for the Court was that the loss was not a result of some established

*Zimmerman Brush Co.*¹⁰³ announced that its *Parratt* conclusion would not have been the same if the deprivation had been other than the result of random negligence.¹⁰⁴

In *Hamilton Bank*, the Court did recognize the problem presented by the juxtaposition of these two prior holdings. Specifically, it recognized the imperfection of the *Parratt* analogy when applied to situations where property deprivation arises out of an established state policy or procedure.¹⁰⁵ Nevertheless, the Court applied *Parratt*, despite its "imperfect[ion]," because when the deprivation is only of *property*, a postdeprivation hearing supplies all the process that is due.¹⁰⁶ Assuming the validity of that line of thinking,¹⁰⁷ it has little application to *Hamilton Bank*. The jury there found that there had been no denial of due process and thus it was not an issue on appeal. The issue was what compensation was due Hamilton Bank as a result of the Planning Commission's taking of Hamilton Bank's property for two years by a calculated course of conduct, a course of conduct that did not cease until the district court ordered a change in its actions. The Supreme Court's discussion makes sense only if the issue is lack of due process, not taking without compensation.

The Supreme Court's new state remedy exhaustion requirement applies only if "procedures [are] provided by the State for obtaining such compensation. . . ."¹⁰⁸ If it can be shown "that the [state's] inverse condemnation procedure is unavailable or inadequate . . ."¹⁰⁹ resort to state litigation need not be had.

For those lawyers practicing in California, this decision should have

state procedure nor one that the state could predict occurring. *Parratt v. Taylor*, 451 U.S. 527, 541 (1981). Thus, because the actions were beyond the state's control, it would be impossible to provide a meaningful predeprivation hearing. *Id.*

103. 455 U.S. 422 (1982).

104. The Court contrasted *Parratt*'s lack of an established state procedure with the state system in *Logan* that destroyed a complainant's property interest by operation of law. *Id.* at 435-36.

105. *Hamilton Bank*, 105 S. Ct. at 3122. Such a situation also arose in *Logan*.

106. *Id.*

107. One must note that only government officials find this logic satisfying. The blood of any property owner runs cold when informed that the government may do as it pleases and the only "remedy" is to file suit and litigate the matter for years. See *infra* note 126 and cases cited. The time it takes to litigate these matters too often results in foreclosure. See *supra* note 13 and *infra* note 126 and accompanying text.

108. *Hamilton Bank*, 105 S. Ct. at 3121.

109. *Id.* at 3122.

little effect. California courts have clearly held that land use regulations, regardless of the severity of their impact, will not subject the regulator to inverse condemnation liability.¹¹⁰ As Professor Williams notes, the California Supreme Court has "read inverse condemnation out of California jurisprudence, as a remedy for disappointed developers in land use cases."¹¹¹

Other courts, by contrast, have either acknowledged the availability of an inverse condemnation remedy¹¹² or have not spoken on the issue.¹¹³ Absent a definitive rejection, like California's, attempt must be made now to recover compensation in the state courts.

COUNTING NOSES

So, where are we?

Before *Hamilton Bank*, we had the three opinions in *San Diego Gas* for guidance. Justice Blackmun's opinion for the Court, joined by Justices White and Stevens and Chief Justice Burger, did not reach the merits except to belatedly note that the issue's implication of the federal constitution is not "to be cast aside lightly."¹¹⁴ Justice Brennan's *San Diego Gas* dissent, joined by Justices Marshall, Powell, and Stewart, was a ringing statement that an invalid regulation could work at least a temporary taking that required compensation.¹¹⁵ Justice Rehn-

110. See *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 188 Cal. Rptr. 191 (1982). One California Court of Appeal decision that criticized California's noncompensation rule as being contrary to controlling precedents of the United States Supreme Court was ordered "de-published" by the California Supreme Court. It may be found only in unofficial reports and has no precedential effect. See *Gilliland v. City of Palmdale*, 179 Cal. Rptr. 627, 631 (1981). Indeed, lawyers are forbidden even to cite the case. *Cal. R. of Ct.* 977. *Gilliland v. County of Los Angeles*, 126 Cal. App. 3d 610 (1981); *Agins v. City of Tiburon*, 24 Cal. 3d 66, 157 Cal. Rptr. 372, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

111. 5 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 158.12 at 412 (1985).

112. See *supra* notes 25-30 and cases cited.

113. Tennessee, for example, the state in which *Hamilton Bank* started, has not spoken definitively yet. Notwithstanding the Supreme Court's panoramic reading in *Hamilton Bank*, 105 S. Ct. at 3122, neither *Davis v. Metropolitan Gov't*, 620 S.W. 2d 532 (Tenn. App. 1981), nor *Speight v. Lockhart*, 524 S.W. 2d 249 (Tenn. App. 1975), holds that an inverse condemnation remedy exists. The statement in *Davis* was dictum, in fact, judgment in the property owner's favor was reversed. *Speight*, on the other hand, dealt with recovery of compensation for impairment of access in a *direct* condemnation case.

114. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 633 (1981).

115. *Id.* at 652. See *supra* notes 62-64 and accompanying text.

quist's tantalizing concurring opinion noted that he would have "little difficulty" agreeing with "much" of what Justice Brennan had said.¹¹⁶

Justice Blackmun again penned the Court's opinion in *Hamilton Bank*. Aside from constructing new procedural roadblocks, there is nothing in Justice Blackmun's opinion that suggests that he, the Chief Justice, who signed Justice Blackmun's *Hamilton Bank* opinion as well, or Justice O'Connor, who also signed the *Hamilton Bank* opinion, are yet ready to "cast aside" the serious issues presented. By their silence, they leave the future open to speculation.

Justice Stevens, on the other hand, who also signed the Court's *San Diego Gas* opinion, filed a separate opinion in *Hamilton Bank* that concurred only in the judgment of reversal. Unlike his brethren, Justice Stevens now appears ready to "cast aside" the compensation issue, at least where the taking is "only" temporary.¹¹⁷ His thesis is that when there are legitimate disputes between a citizen and his government, the government should not be held responsible for the financial consequences when it has acted unconstitutionally.¹¹⁸

There are a number of things wrong with Justice Stevens' formulation, not the least of which is the explicit assumption that zoning decisions generally are made in good faith. As noted earlier,¹¹⁹ planning and zoning authorities often engage in game playing with the law.¹²⁰ When one regulation is struck down, they modify it slightly and challenge the property owner to begin litigation anew.¹²¹ When a regula-

116. *Id.* at 633.

117. See *Hamilton Bank*, 105 S. Ct. at 3125 (Stevens, J., concurring).

118. *Id.* at 3126-27. Justice Stevens' philosophy is that fourteenth amendment due process only requires fair state procedures. *Id.* at 3127. He presumes good faith effort by regulatory bodies, such as zoning boards, in the exercise of their official duties. *Id.* As long as fair procedures are followed, injuries to private citizens should not be compensable. *Id.*

119. See *supra* notes 78-80 and accompanying text. See also 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 5.05 at 2 (Supp. 1985).

120. See, e.g., *Estuary Properties, Inc. v. Askew*, 381 So. 2d 1126, 1137 (Fla. Dist. Ct. App. 1979) (regulatory process described as "revolving door"), *aff'd in part, rev'd in part*, *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); *Prince Georges County v. Blumberg*, 44 Md. App. 79, 93, 407 A. 2d 1151, 1161 (Md. App. 1979) (regulatory process described as "charade"), *cert. denied*, 449 U.S. 1083 (1981); cf. *Raley v. California Tahoe Reg. Plan. Agency*, 68 Cal. App. 3d 965, 984, 137 Cal. Rptr. 699, 711 (1977) (owner was "victim of maladroitly engineered environmental controls").

121. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting); R. BABCOCK & C. SIEMON, *supra* note 81, at 288; Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57

tion of one city is struck down, other cities in the same state ignore the ruling and challenge property owners to take their particular ordinances to court. Richard F. Babcock, dean of the American land use bar, noted this problem nearly two decades ago, concluding that judicially imposed injunctions have only nominal impact on local governmental decision-making bodies.¹²² Of course, in the two decades since Mr. Babcock wrote, the time it takes to litigate these matters has lengthened substantially, and the cost has increased astronomically.

If government agencies insist on pushing the law to, and past, the brink of constitutionality, one is hard-pressed to see why they should not pay the price when they go too far. As two commentators noted, local government's ability to govern must be assessed skeptically, with a tacit acknowledgment that legislative (zoning) actions may have no legitimate purpose or simply may be based on a parochial vision that is unduly harsh and lacks a compensating public benefit, or they merely may be inept.¹²³

Thus, the assumption underlying Justice Stevens' thesis seems out of touch with reality.¹²⁴ Moreover, in 1980 the Court held that a city's good faith is no defense in a Civil Rights Act case.¹²⁵

Finally, the idea that "temporary" harm is somehow constitutionally acceptable buries reality under a palliative label that provides no relief. The "temporary" time periods involved can be substantial. The two year period of *Hamilton Bank* was uncommonly swift. It is not unusual for property owners to be forced to cool their heels for five years

IND. L.J. 45, 51 (1982); Willemsen & Phillips, *Down-Zoning and Exclusionary Zoning in California Law*, 31 HASTINGS L.J. 103, 116 (1979).

122. R. BABCOCK, *THE ZONING GAME* 13 (1966).

123. Goldberg & Meck, *Comment*, 32 LAND USE L. & ZON. DIG., No. 6, at 8 (1980) (quoting 1 WILLIAMS, *AMERICAN LAND PLANNING LAW* 110 (1974)). See also Annot., 49 A.L.R. 3d 13, 52-62 (1973).

124. Compare 1 WILLIAMS, *AMERICAN LAND PLANNING LAW*, 5.07 at 5 (Supp. 1984), in which the author suggests that the Court's half-century absence from the land use field before 1974 has led to much confusion by the Court in general since its interest was rekindled.

125. *Owen v. City of Independence*, 445 U.S. 622, 650-51 (1980). Both the legislative purpose for enacting § 1983 and public policy mandate rejection of immunity for good faith constitutional violations. *Id.* A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy only is accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. *Id.* at 651.

and more.¹²⁶ Properties are lost by foreclosure during these protracted periods during which mortgage payments and property taxes, to the entity that is denying use, continue unabated.¹²⁷ Often these cases involve elderly property owners, who planned to live off the income from the property during their retirement, or to see its development as their lasting legacy. Sometimes they do not even live to see the end of the litigation.¹²⁸ "Temporary" is in the eye of the beholder.

Justice Brennan on the other hand, filed a separate concurring opinion in *Hamilton Bank*, joined by Justice Marshall, in which he reiterated his *San Diego Gas* views.¹²⁹ Justice Powell, who was ill during part of the term, did not participate in *Hamilton Bank*. Nonetheless, in other cases he has repeatedly cited Justice Brennan's *San Diego Gas* dissent in situations where other authority was plainly available.¹³⁰ It is thus probably true that Justice Powell likewise remains committed. Justice Stewart, of course, has retired and been replaced by Justice O'Connor, whose views are not yet in the record.

Justice Rehnquist, who filed the tantalizing concurrence in *San Diego Gas*, did not write separately in *Hamilton Bank*. Thus, of the original four dissenters, three remain on the Court and committed to their views. The separately concurring Justice remains an enigma.

The sole remaining Justice whose position needs to be assessed is Justice White. Justice White joined the Blackmun plurality in *San Diego Gas*, but his contribution to *Hamilton Bank* merely adds to the confusion surrounding the two cases. Justice White did nothing more than "dissent from the holding that the issues in this case are not ripe for decision at this time."¹³¹

What does that mean? Does he favor compensation or not? If he believed the case was not only ripe, but wrongly decided by the court of appeals, one might have expected him to note some agreement with

126. See, e.g., *William C. Haas & Co. v. City of San Francisco*, 605 F. 2d 1117 (9th Cir. 1979) (five years), *cert. denied*, 445 U.S. 928, *reh'g. denied*, 446 U.S. 929 (1980); *Drakes Bay Land Co. v. United States*, 424 F. 2d 574 (Ct. Cl. 1970) (nine years); *Ventures in Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (1979) (seven years).

127. See *supra* note 13 and cases cited.

128. E.g., *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985).

129. *Hamilton Bank*, 105 S. Ct. at 3124-25.

130. *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 305-06 (1981) (Powell, J., concurring); *Parratt v. Taylor*, 451 U.S. 527, 553 n.12 (1981) (Powell, J., concurring).

131. *Hamilton Bank*, 105 S. Ct. at 3124.

Justice Stevens' analysis, but he did not. If he believed the case was not only ripe, but correctly decided by the court of appeals, one would have expected him to dissent from more than just the ripeness holding.

So, with the bravado of an Etruscan haruspex, the entrails of whose sheep are still warm, one may confidently say it appears Justices Brennan, Marshall, and probably Powell continue to believe in compensation. Justice Rehnquist has given no clue to the contrary. That is a possible four on the compensation side. Justice Stevens has announced himself opposed to compensation, while Justice White has obscured his position. The balance, thus, seems to lie with the Chief Justice and Justices Blackmun and O'Connor, who have not announced any predilections on the subject.

Those who like to sprinkle tea leaves over their sheep's entrails might wish to consider the following. In *Penn Central Transportation Co. v. City of New York*,¹³² Justice Rehnquist dissented and expressed the belief that New York City's Landmarks Preservation Law effected a taking when it compelled the owner of Grand Central Terminal to maintain the building as an official landmark. In *Dickman v. Commissioner*,¹³³ the Chief Justice, speaking for the Court in a gift tax case, concluded that the right of property use is perhaps paramount of all the rights associated with property interest.¹³⁴ Additionally, in *Ruckelshaus v. Monsanto Co.*,¹³⁵ Justice Blackmun, speaking for the Court, said that the right to make use of one's own property is constitutionally protected.¹³⁶ Justice Blackmun also reaffirmed that the proper remedy for a taking, in that case, effected by a regulation, was compensation to the owner, not invalidation of the regulation.¹³⁷ As 1985 drew to a close, a unanimous Court led by Justice White reaffirmed the *Ruckelshaus* decision that compensation, not invalidation, is the appropriate remedy for a regulatory taking of property.¹³⁸

At this writing, all one can do is speculate. But the amount of grist for such speculation is increasing.

132. 438 U.S. 104, 140-44 (1978) (Rehnquist, J., dissenting).

133. 465 U.S. 330, *reh'g. denied*, 104 S. Ct. 1932 (1984).

134. 465 U.S. at 336, 104 S. Ct. at 1090.

135. 104 S. Ct. 2862 (1984).

136. *Id.* at 2878.

137. *Id.* at 2880.

138. *United States v. Riverside Bayview Homes*, 106 U.S. 455 (1985).

CONCLUSION

One could take the position that this is all black comedy; that lawyers should smile as they continue to litigate these cases and charge clients for their efforts. But the problem is far too serious for that. Too many people are being victimized simply because the law is unclear. To allow the law to remain so is scandalous when the solution is so simple. One of these cases needs deciding. If not *Agins*, nor *San Diego Gas* nor *Hamilton Bank*, then surely something else is in the pipeline that can provide an appropriate vehicle. This issue has been allowed to fester far too long. The time has come for the Supreme Court to give a definitive answer so that local government agencies and all who deal with them can make decisions based on firm knowledge of the consequences rather than rolling the dice each time. As this article goes to press, the Supreme Court announced its intention to consider the regulatory issue again. The Court has noted probable jurisdiction in *MacDonald, Sommer & Frates v. County of Yolo*.¹³⁹ The troops are being roused to battle again. Stay tuned. We may have an answer yet.

139. 106 U.S. 244 (1985).

