California Western Law Review

Volume 29 | Number 1 Article 2

1992

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Timothy V. Kassouni

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Recommended Citation
Kassouni, Timothy V. (1992) "The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights," *California Western Law Review*: Vol. 29 : No. 1 , Article 2.
Available at: https://scholarlycommons.law.cwsl.edu/cwlr/vol29/iss1/2

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CALIFORNIA WESTERN
LAW REVIEW

VOLUME 29 Fall 1992 NUMBER 1

THE RIPENESS DOCTRINE AND THE JUDICIAL RELEGATION OF CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS

TIMOTHY V. KASSOUNI*

"[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

—Justice Potter Stewart.[1]

"Suffice it to say that even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and that few of us would put equal value on the first and the third."

—Judge Stephen Reinhardt.[2]

INTRODUCTION

United States Supreme Court decisions reviewing challenges based on the Fifth Amendment's Just Compensation Clause,[3] and in particular those

* Loyola Law School, J.D. 1989; University of California, Berkeley, A.B. 1985. The author is currently a land use attorney with Hamilton & Samuels in Newport Beach, California. Research for this article was conducted while the author was a fellow of the Pacific Legal Foundation College of Public Interest Law. Pacific Legal Foundation is a nonprofit, public interest legal group committed to the defense of private property rights, individual freedoms, the concept of limited government, and the free enterprise system.

1. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

2. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 911 F.2d 1331, 1338 n.5 (9th Cir. 1990), *rev'd* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991).

3. The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This provision, also referred to as the "Takings Clause," was made applicable to the states through the Fourteenth Amendment. Chicago, Burlington, & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

handed down in the 1980's, are notable for their obsessive preoccupation with ripeness requirements. Although ripeness is an essential prerequisite to federal court subject matter jurisdiction under Article III of the Constitution,[4] the concept has been stretched beyond its rational limits in the property rights arena.

In a series of decisions culminating in *MacDonald, Sommer & Frates v. County of Yolo*,[5] the Supreme Court repeatedly declined to reach the merits of the Fifth Amendment Just Compensation Clause challenge. The Supreme Court based its respective holdings, with the exception of *San Diego Gas & Electric Company v. City of San Diego*,[6] on the property owner's failure to submit a ripe claim. The net result is a special ripeness doctrine applicable only to constitutional property rights claims. Conspicuously absent from this new doctrine are the equitable considerations which formed the basis of the Court's more established definition of ripeness. In many cases, especially those involving First Amendment freedom of speech issues, equity has been the strongest argument in favor of judicial review. Unfortunately, given the Court's reluctance to grant certiorari in constitutional property rights cases, the new ripeness doctrine could plague property owners for some time to come.[7]

This article will begin with a general discussion of the ripeness requirement and its relation to Article III "cases" and "controversies." It will become apparent how the Supreme Court's traditional conception of ripeness bears little resemblance to the formalistic test applicable to constitutional property rights.

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4. Federal subject matter jurisdiction is limited to "cases" and "controversies." U.S. CONST. art. III. For a general critique of the "constitutionalization" of the law of federal justiciability, see Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987).

5. 477 U.S. 340 (1986).

6. 450 U.S. 621 (1981). *See infra* note 64 for a discussion of *San Diego Gas & Electric.*

7. In the last several years, the Supreme Court has declined to review a number of cases which have significantly curtailed private property rights. These cases include the remanded First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353, 1367 (1989) (no taking because "[m]eals could be cooked, games played, lessons given, tents pitched" on plaintiff's property); Moore v. City of Costa Mesa, 886 F.2d 260, 263 (9th Cir. 1989) (damages for a temporary taking only available for a deprivation of economically viable use, and not for governmental action which fails to advance legitimate state interests); Batch v. Town of Chapel Hill, 387 S.E.2d 655, 663 (N.C. 1990) (because the government "authorized" a land use exaction, it substantially advanced a legitimate state interest); Presbytery of Seattle v. King County, 787 P.2d 907, 913 (Wash. 1990) (in order to avoid "intimidating the legislative body," takings damages not available as a matter of law if the regulation seeks to prevent public harm); Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, 911 F.2d 1331 (9th Cir. 1990), *rev'd* Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991) (just compensation claim not ripe because property owners failed to request an amendment to the land use law itself); Kaiser Development Company v. City and County of Honolulu, 913 F.2d 573, 575 (9th Cir. 1990) (taking claim based on inequitable precondemnation activities requires a concurrent showing of deprivation of all economically viable use of property); Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991) (no heightened scrutiny of permit exactions under the Fifth Amendment).

The article will then address the Supreme Court's application of the ripeness doctrine to constitutional property rights claims, including Fifth Amendment just compensation, due process, and equal protection challenges. These constitutional claims will be discussed separately because a number of courts have mistakenly held that the ripeness doctrine should be given uniform application, when in fact it should only apply to just compensation claims. Even among just compensation claims, ripeness rules will vary according to the specific theory being pursued by the property owner.

The second part of the article will also address special problems associated with the two-prong ripeness test set forth in *Williamson County Regional Planning Commission v. Hamilton Bank.*[8]

The third part of the article will focus on what has become the most troublesome aspect of the ripeness doctrine for lower courts; the so called "futility exception." While the Supreme Court has acknowledged the existence of this exception, it has failed to offer any guidance as to the circumstances in which it would apply. Similarly, lower courts cite the exception but rarely find it applicable to a specific set of facts.

The article will include suggestions for modifying the ripeness doctrine and its futility exception. The sole purpose of this doctrine should be adequate federal court subject matter jurisdiction. It should not be fashioned into a tool to serve the dilatory aims of governmental entities.

I. TRADITIONAL RIPENESS REQUIREMENTS

The Supreme Court has referred to *Abbott Laboratories v. Gardner*[9] as "our leading discussion of the [ripeness] doctrine."[10] The reasoning of *Abbott Laboratories* is worth exploring here, because it has been largely ignored by courts when constitutional property rights are at issue.

In *Abbott Laboratories*, a group of drug manufacturers brought an action for declaratory and injunctive relief against enforcement of a federal regulation which created specific labeling requirements. The Supreme Court began its ripeness discussion by establishing an analytical framework: "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[11] The Court was convinced that the issues were fit for decision and that the equities tilted in favor of substantive review.

8. 473 U.S. 172 (1985).
9. 387 U.S. 136 (1967).
10. Pacific Gas & Electric Co. v. State Energy Resources Comm'n, 461 U.S. 190, 201 (1983).
11. *Abbott Laboratories*, 387 U.S. at 149.

A. Fitness of the Issues for Judicial Decision

With respect to the first prong of the ripeness test, fitness of the issues for judicial decision, the *Abbott Laboratories* Court noted that the issue before it was "purely legal" and that the government "made no effort to justify the regulation in factual terms."[12] The Court also found the regulation to be a definitive "final agency action"[13] because it was "promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties."[14]

The Court's "finality" determination was largely influenced by a line of prior Supreme Court decisions which had relied on "pragmatic" considerations.[15] These decisions, *Columbia Broadcasting System, Inc. v. United States*,[16] *Frozen Foods Express v. United States*,[17] and *United States v. Storer Broadcasting Company*,[18] demonstrated a "flexible view of finality"[19] by finding certain claims reviewable even though the challenged regulations were not being specifically enforced.[20]

In *Columbia Broadcasting System*, the Federal Communications Commission (FCC) enacted regulations which proscribed certain contractual arrangements between chain broadcasters and local stations.[21] The FCC refused to license local stations which maintained such contracts.[22] A pre-enforcement challenge was brought by CBS, which claimed an *anticipated* loss of revenue as a result of lost contracts.[23] The Supreme Court held that the action was ripe for review. The Court explained that, "[s]uch regulations have the force of law before their sanctions are invoked as well as after. When as here they are promulgated by order of the [FCC] and the *expected conformity to them causes injury* cognizable by a court of equity, they are appropriately the subject of attack. . . ."[24]

In *Frozen Foods Express*, the Interstate Commerce Commission (ICC) ruled that specified commodities of a motor carrier did not fall under an "agricultural" exemption, and that motor vehicles transporting those

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12. *Id.*
13. *Id.*
14. *Id.* at 151.
15. "The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Id.* at 149.
16. 316 U.S. 407 (1942).
17. 351 U.S. 40 (1956).
18. 351 U.S. 192 (1956).
19. *Abbott Laboratories*, 387 U.S. at 150.
20. These claims are often called "pre-enforcement challenges."
21. *Columbia Broadcasting System*, 316 U.S. at 408.
22. *Id.* at 411-12.
23. *Id.* at 419.
24. *Id.* at 418-19 (emphasis added).

commodities were subject to a permitting requirement.[25] The District Court dismissed the motor carrier's challenge to the ICC ruling on the ground that the "order" of the ICC was not subject to judicial review.[26] The Supreme Court disagreed:

> The determination by the [ICC] that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. The 'order' of the [ICC] warns every carrier, who does not have authority from the [ICC] to transport those commodities, that it does so at the risk of incurring criminal penalties.[27]

Finally, in *Storer Broadcasting*, the FCC enacted rules prohibiting ownership of more than a limited number of broadcast stations.[28] In finding a preenforcement challenge ripe for review,[29] the Court emphasized that unless Storer obtains a modification of the FCC's declared administrative policy, it cannot enlarge the number of its standard or FM stations.[30]

These three cases exhibited a flexible approach to the first prong of the ripeness test because they did not require actual enforcement of the challenged regulations. If the plaintiff could prove that its operations would be interfered with by a final regulation, the issues would be fit for judicial decision. The *degree* of interference, however, must also be considered in determining ripeness. This is the "hardship" inquiry.

B. Hardship to the Parties

The second prong of the *Abbott Laboratories* ripeness test, hardship to the parties, is closely tied to the first but remains a distinct inquiry. In *Columbia Broadcasting System*, *Frozen Food Express*, and *Storer Broadcast-*

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25. *Frozen Food Express*, 351 U.S. at 41.

26. *Id.* at 43.

27. *Id.* at 43-44. Justice Harlan, in dissent, was troubled by the fact that the ICC order was "directed to no one in particular and is binding on no one" and that the ICC was willing, in individual cases, to "reconsider its determinations with respect to particular commodities. . . ." *Id.* at 47. Justice Harlan urged the Court to be "wary of establishing a procedure which would prematurely throw into the courts questions of statutory construction not arising in the context of concrete facts, and which does not bring to the courts even the benefit of final interpretation by the agency assigned to administer the statute." *Id.*

Although Justice Harlan expressed a dissenting view, these concerns later influenced the Court to dismiss property rights cases for lack of ripeness.

28. *Storer Broadcasting*, 351 U.S. at 193-94.

29. Although the *Storer Broadcasting* Court concluded that the broadcaster had "standing" to sue, *Id.* at 198, the discussion seemed to encompass ripeness as well. The Court prefaced its discussion by noting that jurisdiction "depends upon standing to seek review and upon ripeness." *Id.* at 197.

30. *Id.* at 199-200. As in *Frozen Food Express*, Justice Harlan dissented: "However these allegations are read, they assert no more than that the Commission may in the future take action pursuant to the regulations to deny or revoke a license. Of course, if such action should ever be taken, Storer would then be 'aggrieved.'" *Id.* at 208-09.

ing, the Supreme Court concluded that the regulations at issue were "final" *and* inflicted a "cognizable" injury.[31] The first prong focuses on the nature of the regulation, while the second prong focuses on the practical effect of the regulation on the party seeking to invalidate it.

In *Abbott Laboratories*, the Supreme Court found the impact of the regulations "sufficiently direct and immediate as to render the issue appropriate for judicial review."[32] In order for the drug manufacturers to comply with the labeling requirements, they would have to "change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies."[33] The Court went on to point out that the only alternative to compliance would be continued use of existing material, with the concomitant risk of civil and criminal penalties.[34]

When will the "hardship to the parties" be severe enough to tip the scale in favor of judicial review? In *Abbott Laboratories*, the Supreme Court responded to the contention that a "possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action."[35] The Court held that,

> [t]here is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions.[36]

This language rejects a mechanical test for determining "hardship to the parties." Courts must necessarily engage in an ad hoc, case-by-case inquiry.[37] The financial burden placed on Abbott Laboratories by having to purchase new printing supplies and materials was considered a sufficient "hardship" to warrant judicial review.

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31. *Columbia Broadcasting System Inc.*, 316 U.S. at 419.

32. 387 U.S. at 152.

33. *Id.* at 152-53.

34. *Id.* at 153.

35. *Id.*

36. *Id.* at 154. However, in Federal Trade Comm'n v. Standard Oil Co. of California, 449 U.S. 232 (1980), the Supreme Court held that the issuance of a complaint by the Federal Trade Commission was not "final agency action" because it merely stated that there was "reason to believe" a violation of the Federal Trade Commission Act had occurred. *Id.* at 241. Moreover, the Court refused to equate litigation expenses with "hardship to the parties," the former being "'part of the social burden of living under government.'" *Id.* at 244 (quoting Petroleum Exploration, Inc. v. Public Service Comm'n, 304 U.S. 209, 222 (1938)). *But see* Central Hudson Gas & Electric Co. v. Environmental Protection Agency, 587 F.2d 549, 559-60 (2d Cir. 1978) (litigation expenses, in combination with other factors such as costs associated with undue delay, could establish "hardship" under the *Abbott Laboratories* ripeness test).

37. "The ripeness inquiry . . . necessarily consists of a case-by-case evaluative process that weighs the interests in avoiding review—'non-fitness' and governmental hardship—against the hardship to the plaintiff of denying review." Robert C. Power, *Help Is Sometimes Close At Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 611.

Courts should not draw arbitrary standards for determining when the impact of a regulation is significant enough to rise to the level of a "hardship." For some large businesses, twenty thousand dollars is not a significant amount of money. For a middle class property owner, twenty thousand dollars could represent one half of an entire annual income.

C. *Post*-Abbott Laboratories *Ripeness Cases*

Of the later Supreme Court decisions applying *Abbott Laboratories* to support ripeness, *Pacific Gas & Electric Co. v. State Energy Resources Commission (PG&E)*[38] is particularly significant. *PG&E* involved the question of whether California's Warren-Alquist State Energy Resources and Development Act, which imposed conditions on the construction of nuclear power plants, was preempted by the federal Atomic Energy Act.[39] One provision of the state legislation imposed a moratorium on the certification of new nuclear plants pending development of adequate technology for the disposal of nuclear waste.[40]

The moratorium provision was held ripe for review. The Supreme Court, citing the *Abbott Laboratories* test, first noted that the "question of preemption is predominantly legal," and that the Court need not wait for "California's interpretation of what constitutes a demonstrated technology or means for the disposal of high-level nuclear waste."[41]

The Court then considered the hardship to PG&E of withholding judicial review:

> For the utilities to proceed in hopes that, when the time for certification came, either the required findings would be made or the law would be struck down, requires the expenditures of millions of dollars over a number of years, without any certainty of recovery if certification were denied. The construction of new nuclear facilities requires considerable advance planning—on the order of 12-14 years.[42]

Substantial planning expenditures were thus sufficient to establish a hardship under the second prong of the ripeness test. An even *stronger* equitable consideration, above and beyond expenditures, was the fact that *PG&E* had no assurance whatsoever that its application to build a nuclear power plant would be approved. As will be discussed in more detail below, this common sense reasoning has never been applied to constitutional property rights cases.

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38. 461 U.S. 190 (1983).
39. *Id.* at 194-95.
40. *Id.* at 198.
41. *Id.* at 201.
42. *Id.* (footnotes omitted).

Both prongs of the ripeness test thus require pragmatic, flexible considerations; "final agency decision" can occur prior to actual enforcement of the regulation,[43] while "hardship to the parties" contemplates the economic impact of the regulation.[44]

D. The Ripeness Doctrine and First Amendment Freedom of Speech

Courts have been readily willing to find First Amendment freedom of speech issues ripe for review. The apparent explanation seems uncomplicated; courts believe that freedom of speech is more worthy of judicial review and protection than other constitutional rights. A cursory glance through most constitutional law treatises reveals the disparity.[45] As one commentator noted:

> The assessment of hardship may be complicated . . . by the fact that some rights are more jealously protected than others. When such rights are at issue, ripeness may require a lower probability and gravity of any predicted intrusion. First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection. . . .[46]

While cases illustrating this point are numerous,[47] several in particular merit discussion.

In *Steffel v. Thompson*,[48] the plaintiff was threatened with arrest for distributing handbills protesting American involvement in Vietnam. Plaintiff argued that the application of a Georgia statute proscribing trespass violated his First Amendment right of free speech. The United States Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal of the action on the ground that "threatened" enforcement of a statute does not rise to the level of an "actual controversy" under Article III of the United States Constitution.[49]

The Supreme Court reversed. The threat of prosecution was not "imaginary or speculative" because the police had warned plaintiff that if the

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43. "'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)).

44. *See* Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985) (question of whether participants in the Federal Insecticide, Fungicide, and Rodenticide Act's registration scheme were required to submit to binding arbitration held ripe for review because of the "continuing uncertainty and expense" of relying on a constitutionally suspect compensation procedure).

45. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) (Devoting 277 pages to free speech. The Fifth Amendment's Just Compensation Clause is afforded 20.).

46. 134 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532.3 at 159 (2d ed. 1984).

47. *Id.*

48. 415 U.S. 452 (1974).

49. Becker v. Thompson, 459 F.2d 919, 922 (5th Cir. 1972).

handbilling continued he would "likely be prosecuted."[50] In these circumstances, the Court noted, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."[51]

In addition, the Court found strong reasons for addressing the merits of the declaratory relief action without first requiring the Georgia state courts to render judgment:

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.[52]

This reasoning has been ignored in the constitutional property rights arena, where one of the increasingly long list of ripeness requirements is that the plaintiff *first* seek compensation in the state court before the federal courts retain subject matter jurisdiction.[53]

The United States District Court in *Spartacus Youth League v. Board of Trustees of the Illinois Industrial University*[54] made no effort to hide its favoritism. In *Spartacus*, a student organization devoted to Marxism claimed that university regulations governing the distribution and sale of literature on campus violated its First Amendment right of freedom of speech.[55] One regulation in particular prevented nonstudents from distributing literature on campus on behalf of a student organization.[56]

The District Court held that the mere threat of enforcement was sufficient to establish ripeness: "In the First Amendment area . . . a somewhat relaxed standard of uncertainty is applicable. Injury to First Amendment rights may result from the threat of enforcement itself, since it may chill the plaintiff's ardor and eliminate his desire to engage in protected expression."[57]

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50. *Steffel*, 415 U.S. at 459.

51. *Id.* *See also* Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 604 (1967) ("'[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions'" (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963))).

52. *Id.* at 462. The Court applied this reasoning to both facial *and* as-applied constitutional challenges. *Id.* at 475.

53. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985).

54. 502 F. Supp. 789 (N.D. Ill. 1980).

55. *Id.* at 795.

56. *Id.* at 793.

57. *Id.* at 796-97. *See also* National Student Association v. Hershey, 412 F.2d 1103, 1113 (D.C. Cir. 1969) ("it appears that suits alleging injury in the form of a chilling effect may be more readily justiciable than comparable suits not so affected with a First Amendment interest.").

While freedom of speech is a fundamental constitutional right, there is no legal, moral, or prudential reason to grant it preferential status. Other constitutional rights, such as the right of just compensation for a taking of private property, are also worthy of judicial solicitude. As the Supreme Court once remarked in a discussion of standing requirements, "we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might . . . invoke the judicial power of the United States."[58] This reasoning should apply with equal force to the ripeness doctrine.

The Supreme Court's traditional ripeness test is best characterized as pragmatic. Courts must decide on a case-by-case basis whether the equities of the party seeking judicial review are outweighed by the proscription against advisory opinions, or vice-versa. As the Supreme Court noted with respect to the Declaratory Judgment Act,

> [t]he difference between an abstract question and a 'controversy' . . . is necessarily one of degree, and *it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy.* Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.[59]

The next section will demonstrate just how far the Supreme Court has departed from this traditional approach in the property rights arena.

II. APPLICATION OF THE RIPENESS DOCTRINE TO CONSTITUTIONAL PROPERTY RIGHTS CLAIMS

The 1980's was a decidedly mixed bag from the perspective of private property rights. The victories were *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[60] which established monetary compensation as a remedy for permanent or temporary takings of property, and *Nollan v. California Coastal Commission*,[61] which established a requirement of heightened judicial scrutiny of regulations challenged under the Just Compensation Clause.[62]

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58. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484 (1982).

59. Golden v. Zwickler, 394 U.S. 103, 108 (1969) (quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) (emphasis added)); *see also* Babbitt v. United Farm Workers National Union, 442 U.S. 289, 297-98 (1979).

60. 482 U.S. 304 (1987).

61. 483 U.S. 825 (1987).

62. *See infra* text accompanying note 68.

The losses were *Keystone Bituminous Coal Association v. DeBenedictis*,[63] and the trio of cases which failed to address the merits of the Just Compensation Clause challenge because the issue was not yet ripe.[64] These three cases, though decided on procedural grounds, must be considered a loss. The time and money required to comply with myriad ripeness requirements will prevent most middle-class property owners from pursuing their constitutional right to just compensation. It is somewhat ironic that the Supreme Court would formulate a heightened level of judicial scrutiny with respect to permit exaction cases, yet also establish a complex set of ripeness requirements that make substantive review virtually impossible when the property owner alleges a deprivation of economically viable use.

A. Just Compensation Clause Challenges: An Overview of the Various Takings Tests

The Supreme Court has repeatedly recognized that the Fifth Amendment's Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[65] In furtherance of this goal, the Court has developed a number of tests for determining whether a taking has occurred.

In *Agins v. Tiburon*, the Court noted that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[66]

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63. 480 U.S. 470 (1987). For further discussion of *Keystone*, *see infra* text accompanying note 78.

64. Agins v. City of Tiburon, 447 U.S. 255 (1980); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348-49 (1986).

In 1981, the Supreme Court also decided *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). In that case, the plaintiff sought damages in inverse condemnation when its property was rezoned from industrial to agricultural and placed within an open-space designation. The issue presented was whether the exclusive remedy for a regulatory taking is invalidation of the offending ordinance or just compensation. The Supreme Court declined to reach the merits of this issue because of the absence of a final judgment. Further state court proceedings were necessary to determine whether or not there had been a taking. *Id.* at 633.

In 1987, the Supreme Court decided the compensation question sidestepped in earlier cases. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), the Court held that the Just Compensation Clause of the Fifth Amendment requires the payment of just compensation to the property owner, and not invalidation of the governmental regulation, whenever a taking occurs. *Id.* at 314-22.

Although one may wonder how a court could hold that the Just Compensation Clause does not require just compensation for a taking, some prior decisions had held that the exclusive remedy was invalidation. *See, e.g.*, Agins v. City of Tiburon, 24 Cal.3d at 266 (1979).

65. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992).

66. *Agins*, 477 U.S. at 260 (citations omitted).

The Court has also found a taking when the government frustrates a property owner's reasonable investment-backed expectations.[67]

1. Failure of a Regulation to Substantially Advance Legitimate State Interests

Failure of a regulation to substantially advance a legitimate state interest was the basis for the Supreme Court's invalidation of a permit exaction in *Nollan v. California Coastal Commission*.[68]

In *Nollan*, the California Coastal Commission (Commission) conditioned the issuance of a rebuilding permit on the requirement that the property owners convey an easement across their beachfront property for the benefit of the general public. The Commission argued that "the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches" were all legitimate state purposes which would justify outright prohibition of the Nollans' project.[69] The Court assumed the validity of these purposes.[70]

The Commission then argued that these "legitimate state purposes" were substantially advanced by the requirement that the Nollans' convey one-third of their property for an easement. In rejecting this contention, the Court noted that the "substantial advancement" test involves a heightened level of judicial scrutiny above and beyond what a particular governmental entity deems rational or reasonable. The Court further explained that, "we have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved . . . *not that 'the State 'could rationally have decided'* that the measure adopted might achieve the State's objective.'"[71] The Court elsewhere described the "substantial advancement" requirement

67. *See infra* text accompanying note 103.

68. 483 U.S. 825 (1987).

69. *Id.* at 834-35.

70. *Id.* The Court also pointed out, however, that outright prohibition of the Nollans' project would only be allowable if economically viable use of property remained. Even assuming "permissible purposes" would be protected by denial of a permit outright, the prohibition could not "interfere so drastically with the Nollans' use of their property as to constitute a taking." *Id.* at 835-36.

71. *Id.* at 834 n.3 (emphasis in original; citation omitted); *see also* Seawall Assoc. v. City of New York, 542 N.E.2d 1059, 1068 (1989) (*Nollan* created a "close nexus" test which requires "'semi-strict or heightened judicial scrutiny of regulatory means-ends relationships'"); Surfside Colony, Ltd. v. California Coastal Comm'n, 226 Cal. App. 3d 1260, 1268 (1991) ("*Nollan* . . . requires a substantial relationship between the public burden posed by proposed construction and conditions imposed by the government to permit that construction."). *But see* Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991) ("we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply. . .").

as an essential "nexus between the condition and the original purpose of the building restriction."[72]

The Commission was not able to meet this requirement because the dedication of a strip of beachfront property did not "substantially advance" the legitimate state interest of ensuring the public's ability to see the beach.[73] The Commission failed to establish the requisite "nexus" between the adverse effects of the Nollans' proposed use and the imposition of the exaction. The two specific "adverse effects" of the Nollans' proposed use identified by the Commission—impairment of "visual access" to the beach and increased use—were entirely unrelated to the requirement that the Nollans dedicate an easement across a portion of their beachfront property. The result, in Justice Scalia's words, was "not a valid regulation of land use but 'an out-and-out plan of extortion.'"[74]

It is evident from the *Nollan* opinion that this takings test does not require a deprivation of economically viable use, nor does it require frustration of reasonable investment-backed expectations. The focus is on the character of the governmental regulation, as opposed to the effect of the regulation on economic uses of property. An exaction which fails to limit itself to the specific adverse effects of a proposed project will be an unconstitutional taking *regardless* of whether the property retains other economically viable uses.[75]

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72. *Nollan*, 483 U.S. at 837 n.3. The dissents in *Nollan* appropriately describe this nexus requirement as a "precise match between the condition imposed and the specific type of burden . . . created by the [proposed use]," *id.* at 849 (Brennan, J., dissenting), and "an 'eye for an eye'" requirement. *Id.* at 865 (Blackmun, J., dissenting).

73. As the *Nollan* Court pointed out: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house." *Id.* at 838-39.

74. *Id.* at 837 (citation omitted). The extortive nature of the Commission's exaction requirement was in large measure the result of the Supreme Court's recognition that "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'" *Id.* at 833 n.2. This undercuts California's longstanding view to the contrary that "[d]evelopment is a privilege not a right." *See, e.g.*, Candid Enter. v. Grossmont Union High Sch. District, 39 Cal. 3d 878, 890 (1985).

75. The Nollans *already owned* a small bungalow which they wanted to replace with a larger house. With or without the exaction, the Nollans had economically viable use of their property. No one, however, suggested that the Nollans' claim was not ripe because they did not allege a permanent ban on the development of their property.

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260 (1991), is instructional. In that case, a residential community of approximately 250 homeowners successfully challenged an exaction imposed by the California Coastal Commission. As in *Nollan* neither the Coastal Commission nor the Court of Appeals so much as considered the possibility that the "ripeness" doctrine would be applicable. The existence of remaining economically viable uses was utterly irrelevant.

2. Deprivation of Economically Viable Use

Courts and scholars have devoted a great deal of attention to the "deprivation of economically viable use" takings test. Unfortunately, almost 70 years after Justice Holmes recognized the possibility that a land use regulation *could* "go [] too far" and result in a taking,[76] the Supreme Court has done little to formulate any standards to help property owners and governmental entities determine *when* a regulation goes "too far."[77]

The primary source of confusion is *Keystone Bituminous Coal Association v. DeBenedictis*.[78] This case has thrown a monkey wrench into an otherwise straightforward requirement that the government pay just compensation whenever a regulation deprives a property owner of economically viable use of land.

In *Keystone*, the State of Pennsylvania enacted a Subsidence Act which required coal mining companies to leave some of their coal in the ground to provide support for the overlying surface estate. The purpose of the Act was to prevent the destruction of buildings, farmland, and water supplies.[79]

In concluding that the Subsidence Act did not constitute a taking of the coal that was required to be left behind, the Supreme Court characterized mining activity that causes land subsidence as "akin to a public nuisance."[80] The Court therefore perceived the case as falling under a "nuisance exception" to the Just Compensation Clause.[81]

Keystone did not, however, address the question of whether a regulation which results in the deprivation of economically viable use could be insulated from the Just Compensation Clause under the guise of a "nuisance exception." The coal mining company had "failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases"[82] because additional coal *could* be mined. Chief Justice Rehnquist, in dissent, insisted that a taking occurs

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

77. The Supreme Court continues to insist that the takings question involves an "ad hoc, factual inquir[y]." Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Yee v. City of Escondido, 112 S. Ct. 1522, 1529 (1992).

78. 480 U.S. 470 (1987).

79. *Id.* at 474-75.

80. *Id.* at 488.

81. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

It is important to bear in mind that *Mugler v. Kansas*, the case which supposedly created a "nuisance exception" to the Just Compensation Clause, was decided more than 30 years before the United States Supreme Court even recognized the *possibility* that regulatory takings could occur in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393. Prior to *Pennsylvania Coal*, a valid exercise of the police power was deemed sufficient to preclude a taking. After *Pennsylvania Coal*, a valid exercise of the police power could result in a taking if it went "too far" in restricting the economically viable use of property.

82. *Keystone*, 480 U.S. at 492-93 (emphasis added).

whenever a regulation deprives a property owner of all economically viable use of land:

> [O]ur cases have *never applied the nuisance exception to allow complete extinction of the value of a parcel of property.* Though nuisance regulations have been sustained despite a substantial reduction in value, *we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.*[83]

Under Chief Justice Rehnquist's analysis of the facts in *Keystone*, the Subsidence Act *did* "completely destroy" the plaintiff's interest in *particular* coal deposits.[84] As such, Chief Justice Rehnquist found a taking requiring just compensation because "[a]pplication of the nuisance exception in these circumstances would allow the State not merely to forbid one 'particular use' of property with many uses but to extinguish *all* beneficial use of petitioner's property."[85]

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83. *Id.* at 513 (Rehnquist, C.J., dissenting) (emphasis added). Chief Justice Rehnquist's reasoning was subsequently adopted by a majority of the Supreme Court in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) ("None of [our cases] that employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimants' land"). For further discussion of the Supreme Court's opinion in *Lucas*, see text accompanying notes 93 and 100, *infra*.

84. *Id.* at 514.

85. *Id.* (Rehnquist, C.J., dissenting) (emphasis in original). A close reading of *Mugler* and its progeny validates Chief Justice Rehnquist's observation. In *Mugler*, the State of Kansas adopted a statute which prohibited the manufacture and sale of intoxicating liquors. Plaintiffs contended that their respective *breweries* would, in light of the statute, be of little or no value if not employed in the manufacture of beer. Plaintiffs did not contend, nor did the *Mugler* Court conclude, that *no* structures at all could be built, or that there was a *complete* deprivation of economically viable use of the property. *Mugler*, 123 U.S. at 623.

In Hadacheck v. Los Angeles, 239 U.S. 394 (1915) a city ordinance made it unlawful for any person to operate an establishment or factory for the manufacture or burning of brick within described geographical limits. The *Hadacheck* Court was *not* presented with a deprivation of economically viable use of property, because the plaintiff was free to construct residences or other types of manufacturing enterprises on the property. Furthermore, the plaintiffs did not allege a Fifth Amendment taking, only a violation of the Due Process clause. *Id.* at 394-95.

In *Miller*, the State of Virginia ordered plaintiffs to cut down a large number of ornamental red cedar trees growing on their property as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity. Plaintiffs were, however, entitled to use the felled trees, and to make any other economically viable use of property, with the sole exception being the continued growth of red cedar trees. Miller v. State Entom't, 135 S.E.2d 813 (1926). It should also be noted that the plaintiffs, as in *Hadacheck*, did not allege a Fifth Amendment taking, only a due process challenge. *Miller* cannot, therefore, be cited as a Fifth Amendment Just Compensation Clause precedent.

In Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), the Town of Hempstead enacted an ordinance regulating dredging and pit excavating on property within its limits. Plaintiffs failed, however, to provide evidence "which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." 369 *Id.* at 594. The *Goldblatt* Court was *not* faced with the question of whether the dredging regulation could have been insulated from the Fifth Amendment's just compensation mandate, even if the regulation had deprived the property owner of all economically viable use.

Lower courts have reached opposite conclusions with respect to this question. In *Lucas v. South Carolina Coastal Council*,[86] the South Carolina Supreme Court held that the "nuisance exception" applies to cases involving a complete deprivation of economically viable use. Similarly, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[87] the California Court of Appeal, on remand from the United States Supreme Court, commented in dicta that "First English would not be entitled to compensation *even if* [the governmental regulation] deprived it of 'all uses' of [land] if that prohibition substantially advances the interest in public health and safety."[88]

In *Whitney Benefits, Inc. v. United States*,[89] however, the Federal Circuit refused to apply the "nuisance exception" to a Congressional Subsidence Act which denied "all use of . . . property and completely destroyed its value."[90] The Ninth Circuit in *McDougal v. County of Imperial*[91] also questioned the existence of a "nuisance exception" to the just compensation requirement: "Even in those cases where the activity restrained was akin to a public nuisance and the state's interest was admittedly substantial, the Court has gone on to weigh the claimant's showing of diminution of value to his property."[92]

The Supreme Court attempted to resolve the conflict in *Lucas v. South Carolina Coastal Council*.[93] In that case, the defendant regulated development along the South Carolina coastline by imposing statutorily mandated setback lines.[94] A setback line precluded the property owner from building residences or making any other reasonable economic use of property.[95]

The Court recognized that in the "extraordinary" circumstance when *no* productive or economically beneficial use of land is permitted, a categorical "just compensation" requirement will be triggered.[96] Categorical treatment may be avoided only if the proscribed use of land was *always* unlawful under traditional background principles of nuisance and property law.[97]

These background principles cannot be "newly legislated or decreed (without compensation), but must inhere in the title itself."[98] Previously

86. 404 S.E.2d 895 (1991), *reversed* 112 S. Ct. 2886 (1992). For a discussion of the Supreme Court's opinion, see text accompanying note 93, *infra*.
87. 210 Cal. App. 3d 1353.
88. *Id.* at 1366 (emphasis added).
89. 926 F.2d 1169 (Fed. Cir. 1991).
90. *Id.* at 1176.
91. 942 F.2d 668 (9th Cir. 1991).
92. *Id.* at 678.
93. 112 S. Ct. 2886 (1992).
94. *Id.* at 2889.
95. *Id.* at 2290.
96. *Id.* at 2893.
97. *Id.* at 2901.
98. *Id.* at 2900.

permissible uses (such as Lucas' previously permissible right to construct a home on his land, prior to enactment of the setback regulations) likewise cannot be extinguished by newly enacted "police power" legislation without just compensation. Only if the police power rationale is coterminous with background principles of nuisance and property law will the just compensation mandate be avoided.[99]

The Supreme Court has yet to hold that viable economic uses of property can be *completely* destroyed without just compensation. A generalized "police power" justification for the land use regulation will certainly not avoid the Fifth Amendment's just compensation mandate.[100] Deprivation of economically viable use, in and of itself, remains an independent standard for judging the constitutionality of land use regulations.

3. Frustration of Reasonable Investment-Backed Expectations

The Supreme Court has repeatedly referred to "[frustration of] reasonable investment-backed expectations" as a distinct takings test,[101] above and beyond the either/or test of *Agins v. City of Tiburon.*[102] While the Court has yet to provide guidance as to the circumstances which will give rise to a reasonable investment-backed expectation, several cases are illuminating.

In *Ruckelshaus v. Monsanto Company*,[103] the Supreme Court addressed the question of whether a requirement of the Federal Insecticide, Fungicide,

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99. *Id.* As was the case in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Supreme Court in *Lucas* mandated heightened judicial scrutiny of land use regulations. In *Nollan*, the Court required that the regulation "'substantially advance' the 'legitimate state interest' sought to be achieved . . . not that 'the State "*could rationally have decided*" that the measure adopted might achieve the State's objective.'" *Id.* at 834 n.3 (emphasis in original; citation omitted).

The *Nollan* Court elsewhere remarked that, "[w]e view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Id.* at 841. This language is strikingly similar to the *Lucas* Court's pronouncement that "the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." *Lucas*, 112 S. Ct. at 2898 n.12, and that "to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim . . ." *Id.* at 2901.

100. *See* text accompanying note 99, *supra.*

101. "The Court . . . has identified several factors that should be taken into account when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.' Among those factors are: 'the character of the governmental action, its economic impact, *and its interference with reasonable investment-backed expectations.*'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (quoting Prunevard Shopping Center v. Robins, 447 U.S. 74, 83 (1980) (emphasis added)). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Kaiser Aetna v. United States, 444 U.S. at 175; Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984).

The "character of the governmental action" and the "economic impact" factors would seem to embrace the "substantial advancement of a legitimate state interest" and "deprivation of economically viable use prongs" of the takings test as articulated in *Agins.*

102. 447 U.S. at 260.

103. 467 U.S. 986, 986 (1984).

and Rodenticide Act (FIFRA) that applicants for pesticide registration disclose trade secrets resulted in a taking of property without just compensation. Three distinct time periods were analyzed: applications submitted prior to October 22, 1972;[104] applications submitted between October 22, 1972, and September 30, 1978;[105] and applications submitted on or after October 1, 1978.[106]

The Court found the reasonable investment-backed expectations of Monsanto "overwhelming" with respect to the middle time period, and held that these expectations alone "dispose[] of the taking question."[107] As the Court explained,

> the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA . . . were to now disclose trade-secret data . . . EPA's actions would frustrate Monsanto's reasonable investment-backed expectations with respect to its control over the use and dissemination of the data it had submitted.[108]

Significantly, the Court was not concerned with Monsanto's remaining economically viable uses, which is also a distinct takings test. Denial of reasonable investment-backed expectations, *in and of itself*, was sufficient to establish a taking:

> That the data retain usefulness for Monsanto even after they are disclosed—for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries—is *irrelevant* to the determination of the economic impact of the EPA action on Monsanto's property right.[109]

The reasonable investment-backed expectations analysis should not be confused with vested rights rules adopted in some states, which are usually grounded on the contract principle of equitable estoppel.[110] A taking can

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104. Prior to amendments made in 1972, FIFRA was silent with respect to the Environmental Protection Agency's authority to disclose trade secrets. *Id.* at 1008.

105. This time period reflects a FIFRA amendment which gave applicants "explicit assurance" that trade secrets would not be disclosed. *Id.* at 1011.

106. FIFRA was amended in 1978 to grant applicants a 10-year period for exclusive use of data submitted in connection with an application for registration. *Id.* at 994.

107. *Id.* at 1005.

108. *Id.* at 1011.

109. *Id.* at 1012 (emphasis added).

110. *See, e.g.*, Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785 (1976); Lakeview Development Corp. v. City of South Lake Tahoe, 915 F.2d 1290 (9th Cir. 1990):

> In contrast to a taking or deprivation claim, the gravamen of a 'vested rights' claim is that the landowner has a right to a particular use of his land because he has relied

occur pursuant to this theory *absent* the element of equitable estoppel. The Supreme Court alluded to this point in *Kaiser Aetna v. United States*.[111]

In *Kaiser Aetna* the Court addressed the question of whether a marina created through the dredging of a private pond became subject to the "navigational servitude" of the federal government, thereby creating a public right of access.[112] The Court concluded that public access would impinge the private property right to exclude others.[113] In reaching this conclusion, the Court responded to the contention that the United States was "estopped" to deny the private ownership of the marina by consenting to its construction:

> But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot 'estop' the United States, . . . it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.[114]

The concept of reasonable investment-backed expectations thus provides an independent standard for judging the constitutionality of a land use regulation.[115] These expectations need not rise to the level of an "estop-

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> to his detriment on a formal government promise (in the form of a permit) stating that he can develop that use. The claim is thus a species of governmental estoppel.

Id. at 1295 (citing Raley v. California Tahoe Regional Planning Agency, 68 Cal. App. 3d 965, 985 (1971)). For a thorough review of the vested rights doctrine, see Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625 (1978).

111. 444 U.S. 164 (1979).

112. *Id.* at 165-66.

113. *Id.* at 179-80.

114. *Id.* at 179 (citations omitted).

115. The Supreme Court's opinion in *Lucas*, 112 S. Ct. 2886, should quiet debate on this point. In that case, the Court addressed, among other things, the question of whether a property owner who has *not* been deprived of all economically viable use may nevertheless be entitled to just compensation:

> Justice Stevens criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.

112 S. Ct. at 2895 n.8 (quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) (citation omitted)).

pel" under state vested rights law.[116]

B. The Ripeness Doctrine and the Just Compensation Tests

In order to assess the "ripeness" of a constitutional property rights claim, it must first be determined which just compensation theory is being pursued. In *Williamson County* and *MacDonald, Sommer & Frates*, the Supreme Court's primary reason for refusing to address the merits of the just compensation claim was an inability to determine whether the regulation had gone "too far" with reference to the economic impact on the property.[117] In language reminiscent of Yogi Berra, the Court said that it "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[118]

This type of ripeness requirement should be applicable only if the property owner is pursuing a just compensation claim based on the deprivation of economically viable use. In that circumstance, the court must know "how far" the regulation goes. If, on the other hand, a property owner argues that a regulation fails to substantially advance legitimate state interests or frustrates reasonable investment-backed expectations, remaining economically viable uses will not defeat a just compensation claim.[119]

1. *Agins v. City of Tiburon*: The First Layer of the "Ripeness" Cake

Agins v. City of Tiburon[120] was the first of a string of Fifth Amendment Just Compensation Clause cases in which the Supreme Court failed to reach the merits of the as-applied challenge.[121] *Agins* does not, however, provide an accurate description of the ripeness doctrine as it exists today. The doctrine has been expanded and refined to such a extent that compliance

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116. In Hoffman v. City of Warwick, 909 F.2d 608 (1st Cir. 1990), the Court of Appeals insisted upon the independence of federal constitutional property rights:

> That the property interest allegedly protected by the Federal Due Process and Taking Clauses arises from state law does not mean that the state has the final say as to whether that interest is a property right for federal constitutional purposes. Rather, federal constitutional law determines whether the interest created by the state law rises to the level of "property" entitled to the various protections of the Fifth and Fourteenth Amendments.

Id. at 615.

117. In *Pennsylvania Coal*, 260 U.S. 393, the first case to recognize regulatory takings, Justice Holmes noted that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

118. *MacDonald, Sommer & Frates*, 477 U.S. at 348.

119. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

120. 447 U.S. 255 (1980).

121. The court has always addressed the merits of facial Just Compensation Clause challenges. *See infra* note 255.

with *Agins* alone will not be sufficient to establish ripeness.

In *Agins*, the City of Tiburon enacted a zoning ordinance which placed the plaintiffs' property in a Residential Planned Development and Open Space Zone.[122] This designation allowed the Agins to build between one and five single-family residences on their five acre tract.[123] The Agins' complaint against the City sought damages for inverse condemnation, and a declaration that the zoning ordinance was facially unconstitutional.[124] The complaint specifically alleged that the rezoning of the land "'completely destroyed the value of [the Agins'] property for any purpose or use whatsoever. . . .'"[125]

The Court refused to address the merits of the as-applied inverse condemnation action: "Because the [Agins] have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions."[126]

The Court did, however, reach the merits of the facial claim. Because the ordinances did not prevent the "best use" of the Agins' land, nor extinguish a "fundamental attribute of ownership," their mere enactment did not constitute a taking.[127] The Agins were free to pursue their "reasonable investment backed expectations" by submitting a development plan.[128]

A ripe as-applied inverse condemnation challenge thus required the submission and rejection of a development plan. The *Agins* Court did not, however, decide just how many development proposals would have to be submitted before the just compensation claim would be ripe for review. Property owners are still waiting for an answer to that question.[129]

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122. *Agins*, 447 U.S. at 257.

123. *Id.*

124. Id.

125. *Id.* at 258.

126. *Id.* at 260.

127. *Id.* at 262.

128. *Id.* It is not entirely clear why the Court referred to the phrase "reasonable investment expectations" to describe the Agins' taking theory. Because the Agins alleged a deprivation of economically viable use, it would seem that the case should have been analyzed under this part of the takings test.

129. The Supreme Court touched upon this issue in an earlier case, Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978). In that case, Penn Central claimed that New York's Landmarks Preservation Law had taken private property without just compensation by preventing the development of air space above the Grand Central Terminal. Penn Central had submitted two separate plans for the construction of an office building atop the terminal, but the Landmarks Preservation Commission disapproved them both. *Id.* at 130.

For several reasons, the Court held that the Preservation Law's interference with Penn Central's air rights was not of sufficient magnitude to require just compensation. First, the Court was not able to determine whether the Preservation Law would deny Penn Central the use of its air space because only two development plans were submitted: one for a 55-story building and the other for a 53-story building. It was unknown, the Court noted, whether a "smaller structure" would have been approved. *Id.* at 137.

Second, even if the Commission would not approve *any* development plan, Penn Central still retained transferable development rights which "mitigate whatever financial burdens" the Preservation Law imposed. *Id.*

1. *Williamson County* and *MacDonald, Sommer & Frates*: The Second, Third, and Fourth Layers of the Ripeness Cake

Although the Supreme Court's holdings in *Williamson County Mission v. Hamilton Bank of Johnson City*[130] and *MacDonald, Sommer & Frates v. County of Yolo*[131] rested on procedural grounds, they have inflicted a great deal of damage on private property rights. Indeed, more damage was inflicted than if the Court had simply upheld the constitutionality of the land use regulations.

This is due in large part to the amorphous nature of the holdings. A ripe claim under *Williamson County* and *MacDonald, Sommer & Frates* requires, among other things, a "final, definitive position" from the government as to the type and intensity of development that will be allowed.[132] Unfortunately, the Court did not indicate what constitutes a "final, definitive position." Nor did it acknowledge the fact that land use planners routinely deny development proposals without the slightest indication of what *would* be deemed satisfactory.[133]

Any judicially created obstacle to a property owner's pursuit of just compensation is a victory for governmental entities. Delay has become a well-honed, tactical weapon of the government; more destructive, in many ways, than substantive takings doctrine.

One often reads judicial opinions and government briefs which forewarn the "chilling effect" on proper land use planning if certain regulations were to require just compensation.[134] Strangely absent is concern over the potential "chilling effect" on private property rights if owners are required to spend years in court without any assurance that their just compensation claims will even be reviewed. Fueled by judicial apathy and funded by tax dollars, government has the "deep pockets" to string out litigation. Middle-class property owners are not so fortunate.

Williamson County involved a taking claim based on an alleged deprivation of economically viable use. The property owner contended that it was entitled to construct over 400 residential units pursuant to original

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In light of the Court's reference to the economic viability of transferable development rights, the discussion of alternative development plans was largely irrelevant, and cannot be read as a "holding," but merely as dicta.

130. 473 U.S. 172 (1985).

131. 477 U.S. 340 (1985).

132. 473 U.S. at 191.

133. "It is a rare land use regulator who doesn't say that, if the owner would only come back with a different plan or at a different time, the new plan would be evaluated on its merits and the result might be different. Agencies can thus be expected to argue that no case is ever 'ripe,' because no denial is ever truly 'final.'" Berger, *Ripeness Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 ZONING & PLAN. L. REP., 8, 58 (1988).

134. For examples of this phenomenon, see Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules For Land-Use Planning*, 20 URB. LAW. 735, 739-43 (1988).

zoning designations, but the local government would only allow the development of 67 units under a revised zoning ordinance.[135]

The District Court jury awarded the property owner $350,000 for a temporary taking. The District Court then granted the government's motion for judgment notwithstanding the verdict on the ground that a temporary deprivation of use, as a matter of law, cannot constitute a taking.[136] The Court of Appeals for the Sixth Circuit reversed, citing the fact that the property had no economically viable use during the time between the government's refusal to approve the higher density development and the jury's verdict.

The Supreme Court in turn reversed the judgment of the Court of Appeals, finding the property owner's claim "premature" even though it had "passed beyond the *Agins* threshold."[137] There were two separate grounds for this finding. First, the property owner did not obtain a "final decision" regarding the application of the new zoning ordinance and subdivision regulations to its property.[138] Although the government rejected the original development proposal for failure to comply with the new zoning ordinance, the property owner did not seek "variances" which would have allowed the higher density development to proceed.[139]

Second, the property owner did not utilize the procedures Tennessee provided for obtaining just compensation.[140] This requirement refers to the Court's oft repeated admonition that the Just Compensation Clause is designed "'not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'"[141] Thus, if the state offers an adequate procedure for obtaining just compensation, "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[142]

MacDonald, Sommer & Frates was also decided on "ripeness" grounds, but added an inventive new twist. In that case, the property owner submitted a tentative subdivision map for the creation of 159 single-family and multifamily residential lots.[143] The government rejected the application, citing inconsistencies with its general land use plan, and inadequate sewer

135. *Williamson County*, 473 U.S. at 178-179, 182.

136. The United States Supreme Court later ruled that temporary takings are indeed compensable. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

137. *Williamson County*, 473 U.S. at 185.

138. *Id.* at 186.

139. *Id.* at 188.

140. *Id.* at 186.

141. Preseault v. Interstate Commerce Commission, 494 U.S. 1, 10, (1990) (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. at 315 (emphasis in original)).

142. *Williamson County*, 473 U.S. at 195.

143. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 342 (1986).

and police service.[144] The property owner then filed suit, claiming the government appropriated all economically viable use by restricting the land to an open-space agricultural designation.[145] The government in turn claimed that the land retained other uses, such as ranch and farm dwellings, and agricultural storage facilities.[146]

Once again, the Supreme Court found itself unable to address the merits of the just compensation claim. Although the property owner received a response to its subdivision proposal, the Court held that the Board of Supervisors had not yet issued its "'final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'"[147] The Court noted that the property owner's complaint alleged the denial of only one intense type of residential development: "Appellant does not contend that only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking."[148]

The *MacDonald, Sommer & Frates* Court cited *Williamson County* at length, but there was no precedent whatsoever for its basic holding. *Williamson County* established the requirement that a property owner obtain a "definitive position" regarding application of regulations to a *specific* development proposal. *MacDonald, Sommer & Frates*, however, went one giant step further by requiring a "final and authoritative determination of the *type and intensity* of development legally permitted on the subject property."[149] A specific development proposal can be conclusively rejected under *Williamson County*, yet still not be ripe for review because the government has not yet expressed an opinion on other *possible* proposals. Just how many other proposals must be submitted to establish a ripe claim cannot be determined from the opinion.

"Ripeness" under *Williamson County* and *MacDonald, Sommer & Frates* thus requires a "final, definitive" decision from the government regarding the application of its land use regulations to a specific development proposal, including a request for a variance; a "final and authoritative" determination of the type and intensity of development that *will* be allowed; and exhaustion of state compensation procedures. These requirements have been repeatedly applied by lower courts in dismissing just compensation cases on procedural grounds.

144. *Id.* at 342-43.
145. *Id.* at 344.
146. *Id.*
147. *Id.* at 351 (quoting *Williamson County*, 473 U.S. at 191).
148. *Id.* at 352 n.8.
149. *Id.* at 348 (emphasis added).

3. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*: The Attempt to Create the Fifth Layer of the Ripeness Cake

Williamson County and *MacDonald, Sommer & Frates* are by no means the last word on the ripeness doctrine. The Ninth Circuit, under the guise of "administrative relief," attempted to add yet another "ripeness" hurdle for property owners seeking redress under the Fifth Amendment's Just Compensation Clause; application for an amendment to the land use law itself. This attempt was later rebuffed by a different panel of the Ninth Circuit,[150] but one suspects that the controversy is not over.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[151] a group of property owners challenged the express provisions of a regional land use plan adopted by the defendant, on the ground that it deprived them of all economically viable use of property.[152]

The Ninth Circuit dismissed as unripe the property owners' second and fifth causes of action for damages resulting from the regulatory taking of private property without just compensation. The Court concluded that the property owners were required to request that TRPA amend the Regional Plan before they filed the action, and that their failure to do so rendered unripe their taking claims.[153]

The court reasoned that an application for an amendment to the Regional Plan would afford petitioners the opportunity for an administrative remedy regarding their plans for development.[154] This administrative remedy, the court noted, "offers the same possibility regarding development as does a system for requesting variances."[155] The court found no reason to distinguish an application for administrative relief, as required in *Williamson County*, from an application for an amendment to the land use law itself: "Certainly as long as the process is limited and reasonably short in duration, and is guaranteed to culminate in either a 'yes' or a 'no,' we believe the plaintiffs are required to pursue it."[156]

This article will proceed to discuss each ripeness requirement separately, with reference to applicable lower court decisions. One reason for this level

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150. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991) [hereinafter TSPC II]. This case was brought by the California property owners. The first case was brought by the Nevada property owners. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 911 F.2d 1331 (9th Cir. 1990) [hereinafter TSPC I].

151. 911 F.2d 1331, *rev'd* 938 F.2d 153 (9th Cir. 1991).

152. *Id.* at 1333.

153. *Id.* at 1336. The Ninth Circuit's "holding" appears to be the opinion of a single judge—the Honorable Stephen Reinhardt. Judge Fletcher, in her special concurrence, stated that she is not "in agreement" as to the "ripeness" portion of the opinion, as she "would not reach the ripeness issue." Judge Kozinski, in his partial dissent, took clear exception with the "ripeness" holding of the *per curiam* opinion. *Id.* at 1344-47.

154. *Id.*

155. *Id.*

156. *TSPC I*, 911 F.2d at 1339.

of detail is to emphasize the importance of the specific type of taking theory being pursued by the property owner. Most courts, the Supreme Court included, have failed to acknowledge the relationship between the ripeness requirements and the various takings tests.

C. The First Finality Requirement: Application of Land Use Regulations to a Specific Development Proposal

Williamson County's requirement that a property owner obtain a final, definitive decision from the government regarding the application of land use regulations to a specific development proposal is easily the least burdensome of the three post-*Agins* ripeness requirements outlined above.

The central core of the requirement, application for a variance, should only applicable when the property owner's development proposal does not fall within the parameters of the governing land use regulation.[157] Recall that in *Williamson County*, the local government refused to grant a development application because it failed to comply with the terms of a *newly enacted* zoning ordinance.[158] The Court thus required the property owner to request a variance from the terms of the new zoning ordinance.[159]

If, however, a property owner submits a development application which complies with existing land use regulations, it is nonsensical to require an application for a variance. A variance from what?

This point was addressed by the Ninth Circuit in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*.[160] In that case, two successive property owners submitted five separate development applications. After receiving a fifth and final rejection of a tentative subdivision map application, the property owner filed an action seeking damages for a taking of private property without just compensation, and for violations of the Equal Protection and Due Process Clauses of the United States Constitution.[161]

In its discussion of the *Williamson County* variance requirement, the Ninth Circuit noted that the City of Monterey "does not dispute that appellants have submitted a formal development application that the City has rejected."[162] More significantly, the Court recognized that the application complied with the city's land use regulations. An application for a variance was therefore not required:

> Because the nature and density of appellants' proposed development did not conflict with express terms in the City's zoning ordinances or its general land use plan, a variance would not have led to tentative map approval, and

157. *See* text accompanying note 160, *infra.*
158. *See* text accompanying note 135, *supra.*
159. 473 U.S. at 188.
160. 920 F.2d 1496 (9th Cir. 1990).
161. *Id.* at 1499-1500.
162. *Id.* at 1502.

> the failure to seek a variance does not affect the ripeness of appellants' claim.[163]

In California, even if a development proposal *conflicts* with applicable land use regulations, the variance requirement of *Williamson County* may still be meaningless. Governmental entities in that state are expressly prohibited from granting a variance for a use of property which is inconsistent with applicable zoning regulations.[164] The government simply lacks the authority to grant relief by means of a variance.

The Ninth Circuit emphasized this point in *Herrington v. County of Sonoma*.[165] In *Herrington*, the property owners filed a Due Process and Equal Protection Clause challenge when the local government rejected an application for a 32-unit subdivision and subsequently downzoned the property to 100-acre minimum lot sizes.[166] The application was well within the parameters of the local government's general land use plan, which set a maximum density of 35 residential units for the 540 acre property, but conflicted with the zoning ordinance.[167] The local government argued on appeal that the property owners were required to apply for a variance before their constitutional claims would be ripe for review.[168] The Ninth Circuit rejected this contention:

> [The variance requirement] need not be met in this case because pursuit of a variance was not a legally viable option. Five months after rejecting the 32-unit subdivision proposal, the Board adopted the Specific Plan, which rezoned the Herrington's [*sic*] property to agricultural use. This designation only allowed residential development with a minimum lot size of 100 acres. The testimony of two County planning witnesses indicated that the *only* means of obtaining approval of the 32-lot proposal was through a General Plan amendment. This testimony finds support in Cal. Gov't Code § 65906, which prohibits the granting of a variance for a use not expressly authorized by the zoning regulation that governs the land in question. Residential development in lots under 100 acres is not an agricultural use, and thus could not be authorized by variance under section 65906.[169]

The United States Claims Court also recognized the inapplicability of the *Williamson County* variance application requirement when the government

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163. *Id.* The Court referred to the ripeness doctrine's "futility exception" in refusing to require a variance application. Other aspects of the "futility exception" will be discussed in Section II.D.

164. California Government Code § 65906 provides in part: "A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property."

165. 834 F.2d 1488 (9th Cir. 1987), *amended in part*, 857 F.2d 567 (9th Cir. 1988).

166. *Id.* at 1492.

167. *Id.*

168. 857 F.2d at 568.

169. *Id.* at 570 (emphasis in original).

lacks the authority to issue one. In *Beure Company v. United States*,[170] the property owner entered into a purchase agreement for the sale of six acres of a 13-acre parcel.[171] Because the parcel was a wetland, the property owner was notified that a permit from the Army Corps of Engineers would have to be obtained.[172] After the property owner agreed to several mitigation conditions, the Army Corps of Engineers determined that provision would also have to be made for the preservation of the calcareous fen, a threatened plant species.[173] Although the property owner agreed to dedicate over three acres of the parcel for the preservation of the fen, the Army Corps of Engineers refused to grant the fill permit.[174] The property owner then filed an inverse condemnation action on the ground that the permit denial resulted in the deprivation of all economically viable use.[175]

In concluding that the property owner's claim was ripe for review, the Claims Court emphasized the fact that the Army Corps of Engineers did not have the statutory authority to grant a variance: "Defendant has not pointed to any procedures in the Corps regulations that permit a landowner to seek either a variance or other analogous relief from a Corps decision."[176]

Del Monte Dunes, *Herrington*, and *Beure* thus demonstrate that the variance application requirement need not be satisfied if the development proposal is consistent with applicable land use regulations, or if the local government does not have the authority to issue a variance.[177]

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170. 16 Cl. Ct. 42 (1988).

171. *Id.* at 43.

172. *Id.* The Army Corps of Engineers has a certain degree of regulatory jurisdiction under the Clean Water Act. 33 U.S.C. § 1251, *et seq.* Congress enacted the Clean Water Act for the purpose of improving water quality, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Pursuant to this goal, Section 404(a) of the Clean Water Act authorizes the Army Corps of Engineers to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Act defines navigable waters as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

Whether potholes and vernal pools are "navigable waters" is a matter of continuing controversy. *See* Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990).

173. *Beure*, 16 Cl. Ct. at 45-46.

174. *Id.* at 46.

175. *Id.* at 47.

176. *Id.* at 49.

177. *See also* Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989). In *Hoehne*, the property owners submitted an application for the subdivision of a 60-acre parcel of land into 4 separate lots. One of the lots was to be developed by the property owners for their retirement home, and the other three were to be sold. The application was consistent with existing land use regulations, which permitted single-family residences on five-acre minimum lot sizes. The local government denied the application and subsequently amended its general land use plan to permit only 40-acre minimum lot sizes on the property. *Id.* at 531.

The Ninth Circuit recognized that the development application was "perfectly permissible under the zoning ordinance's minimum lot size." *Id.* at 533. Because the local government, by legislative act, subsequently changed the zoning designation of the property, "[i]t would have been futile for the Hoehnes to seek a zoning variance to accommodate their application . . ." *Id.* at 534. In addition, variances were simply "not available for exceptions to the requirements of the General Plan." *Id.* at 535.

For similar reasons, *Williamson County*'s finality requirement should not apply to a taking claim based upon failure of a regulation to substantially advance legitimate state interests. A local government's attempt to exact property or fees from a landowner in exchange for issuing a building permit is not normally justified by an express, general land use plan or ordinance which allows for variances. Absent this type of relief mechanism, the decision is final once the exaction is imposed.[178]

D. The Second Finality Requirement: Type and Intensity of Development That Will Be Allowed

The "finality" requirement of *MacDonald, Sommer & Frates* has become one of the most arduous obstacles facing private property owners in their pursuit of just compensation for overburdensome land use regulations. Much of the blame lies with the Supreme Court, which created the requirement that a property owner obtain a "final and authoritative determination of the type and intensity of development legally permitted"[179] without recognizing the fact that governments simply don't make these "determinations."

Some courts, perhaps sympathetic to the financial and emotional plight of property owners faced with their fourth or fifth rejection, have suggested artificial limits on the number of applications that must be submitted before the just compensation claim will be ripe for review.[180] Other courts proceed on a case-by-case basis in an attempt to determine whether the reapplication requirement would constitute an "unfair procedure."[181]

While well intentioned, neither the "artificial limit" approach, nor the "unfair procedure" approach, is a satisfactory solution to the problem created by *MacDonald, Sommer & Frates*. They simply fail to address the inherent illogic behind the reapplication requirement.

MacDonald, Sommer & Frates is a classic example of the ripeness doctrine being "molded to meet the dictates of the substantive claim on the merits."[182] The underlying rationale for the reapplication requirement is

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For further discussion of *Hoehne* within the context of the "futility exception," *see infra* notes 223-233 and accompanying text.

178. The *Williamson County* "finality" requirement would, however, apply to a taking claim based on the frustration of reasonable investment-backed expectations: "Until a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain[s] any reasonable beneficial use *or whether [existing] expectation interests ha[ve] been destroyed.*'" MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 349 (1986) (quoting *Williamson County*, 473 U.S. at 186, 190 n.11, emphasis added)).

179. *MacDonald, Sommer & Frates*, 477 U.S. at 348.

180. *See, e.g.*, Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1501 (9th Cir. 1990).

181. "A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this [finality] determination." *MacDonald, Sommer & Frates*, 477 U.S. at 350 n.7.

182. *See* Nichol, *supra* note 4, at 165.

that a court "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[183] Yet this also serves as a critical factor in determining whether there has been a taking under the "deprivation of economically viable use" prong of the takings test. If a property owner cannot submit evidence that the land use regulation goes "too far," there will not be a taking.

By dismissing the property owner's just compensation claim for failure to obtain a "final and authoritative determination of the type and intensity of development legally permitted,"[184] the Supreme Court relied on *substantive* takings principles. If a property owner submits evidence that the denial of just one development application works a taking, there is no logical reason why the claim is not ripe. The property owner need only convince a trier of fact that lesser uses would not be economically viable. Under the Supreme Court's reasoning, however, a property owner would have to prove that a taking has already occurred before the case will be ripe for review.

A second look at the facts and procedural posture of *MacDonald, Sommer & Frates* will illustrate this point. Recall that the property owner submitted an application for the subdivision of his land into 159 single-family and multi-family lots, which was consistent with the density provisions of the applicable zoning ordinance.[185] The local government denied the application, citing inadequate street access, sewer service, water supplies, and police protection.[186] The property owner then filed suit, alleging that the government appropriated the "entire economic use" of the property, and had refused to provide the public services.[187]

The trial court sustained the government's demurrer. The court reasoned that deprivation of the property's "entire economic use" was an insufficient allegation to sustain a cause of action for inverse condemnation.[188]

The California Court of Appeal affirmed: "'The denial of that particular plan cannot be equated with a refusal to permit any development. . . . [T]he refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development.'"[189] The Supreme Court affirmed the judgment and reasoning of the Court of Appeal.

The fundamental error in this reasoning is that appellate courts are not equipped to decide questions of fact. The property owner alleged a deprivation of the "entire economic use" of land. Implicit in this allegation

183. *MacDonald, Sommer & Frates*, 477 U.S. at 348.

184. *Id.*

185. *Id.* at 342-43.

186. *Id.* at 343.

187. *Id.* at 344.

188. *Id.* at 346 n.4. Perhaps the trial court was not aware that in California, as in most jurisdictions, factual allegations are "deemed admitted by defendant's demurrer." Thompson v. County of Alameda, 27 Cal. 3d 741, 746 (1980).

189. *MacDonald, Sommer & Frates*, 477 U.S. at 347.

is that a less intensive use would *not* be economically viable. If this factual allegation cannot be proven at trial, then the property owner loses.[190] There is no reason, however, to dismiss the case on "ripeness" grounds without giving the property owner an opportunity to make this factual showing.

In *Zilber v. Town of Moraga*,[191] the District Court recognized that *MacDonald Sommer & Frates* only makes sense if less "intensive" development proposals are economically viable:

> The teaching of *Williamson* and *MacDonald* was that courts should not speculate about whether a city will apply a zoning statute to preclude all beneficial use. Consequently, the property owner must pursue any procedures by which he may develop available beneficial use of the property before challenging application of the statute. *However, implicit in this rule is the premise that the statute leaves some beneficial use to the property owner.* If it does not, then submission of a development application to obtain approval for a beneficial use would be pointless and therefore no speculation about the outcome of the application would be necessary.[192]

In determining whether a property owner has complied with the reapplication requirement of *MacDonald, Sommer & Frates*, courts should focus not on the "type and intensity" of development in the original application, but rather the "type and intensity" of development allowed *under the zoning ordinance*. If a development application is consistent with the zoning ordinance, but is nevertheless rejected, the local government should be required to identify an acceptable alternative.[193] This will avoid the

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190. Of course, the property owner could still recover on a "frustration of reasonable investment backed expectations" taking theory, which does not require deprivation of all economically viable use. *See supra* notes 101-116 and accompanying text.

191. 692 F. Supp. 1195 (N.D. Cal. 1988).

192. *Id.* at 1199 n.5 (emphasis added).

193. This has already been suggested by the United States Claims Court in Beure Co. v. United States, 16 Cl. Ct. 42 (1988):

> To comply with [the *MacDonald, Sommer & Frates*] mandate, especially in situations where a takings claim is plausible, a regulatory agency that denies a development plan should specify to the extent it reasonably can based on the information before it, the aspects of the plan that are inconsistent with the regulations and the changes that would be necessary to result in issuance of the permit, *i.e.*, specify the type of development that generally would be permitted consistent with the regulations.

Id. at 50 n.9.

The California Legislature, in Government Code § 65589.5, has similarly required governmental entities to explain the reason for denying housing development projects:

> When a proposed housing development project complies with the applicable general plan, zoning, and development policies in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial

inherent inequity of requiring property owners to submit repeated applications in an effort to determine what type of development the local government would deem acceptable.

Courts should also be careful to limit the ripeness rule of *MacDonald, Sommer & Frates* to cases involving the "deprivation of economically viable use" theory of recovery. When recovery is sought on other bases, such as failure of a regulation to substantially advance legitimate state interests or frustration of reasonable investment backed-expectations, a claim can be triggered by a single governmental act, whether it be the rejection of a development application or the imposition of an exaction.[194]

As noted above, a just compensation claim based on the frustration of reasonable investment-backed expectations does not require a concomitant showing of deprivation of all economically viable use. Recall that in *Ruckelshaus v. Monsanto*,[195] the Supreme Court concluded that a taking of trade secrets occurred through frustration of reasonable investment-backed expectations, even though the trade secrets retained other uses. These other uses, the Court noted, were "irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right."[196]

This same reasoning applies in the land use context. The Supreme Court has often said that a property owner's reasonable investment-backed expectations must be "more than a 'unilateral expectation' or an abstract need.'"[197] However, a development application which complies with existing zoning, as in *MacDonald, Sommer & Frates*, cannot be labeled a "unilateral expectation." Zoning designations are the result of legislative planning and deliberation. They are not "dreamed up" by property owners.

If a governmental entity decides to reject a development application

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evidence on the record that both of the following conditions exist:

(a) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density.

(b) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

CAL. GOV'T CODE § 65589.5 (West 1992).

194. *See supra* text accompanying note 68.

195. 467 U.S. 986 (1984).

196. *Id.* at 1012. One of the economic uses of a trade secret is its "competitive edge" over the products of another company. "[D]isclosure or use by others of the data," the Court noted, "would destroy that competitive edge." *Id.*

It would have been illogical for the Court to require Monsanto to establish a deprivation of all economically viable use in order to recover under the reasonable investment-backed expectations theory. If Monsanto were able to establish deprivation of all economically viable use, there would be no need to consider possible interference with reasonable investment-backed expectations as well, because a taking would have already occurred. Any other approach would render the reasonable investment-backed expectations taking theory sheer surplusage.

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

which complies with existing zoning, then it does so at the risk of destroying the investment-backed expectations of the property owner. The governmental entity should only be able to avoid this result by specifying an economically viable alternative, or by amending the zoning designation.[198]

The *MacDonald, Sommer & Frates* finality requirement is equally inapplicable to a just compensation claim based on the failure of a regulation to substantially advance legitimate state interests. This type of claim is grounded on the "character of the governmental action"[199] as opposed to the effect of the governmental action on the economically viable use of property. It is not necessary to determine "how far" the regulation goes in determining the value of the property if the regulation cannot sustain itself as a valid exercise of the police power.[200]

E. Request for Amendment to the Land Use Law Itself

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (TSPC I)*,[201] the Ninth Circuit attempted to create yet another ripeness requirement that a property owner apply for an amendment to the land use law itself. In conjunction with the already burdensome requirements of finality and exhaustion of state compensation procedures, this new requirement would have transformed the Fifth Amendment's just compensation mandate into a theoretical pipe dream for private property owners. Although a different panel of the Ninth Circuit rejected the land use law amendment requirement,[202] the issue is likely to recur and warrants comment.

There are several reasons why amendment to the land use law, as part of the ripeness doctrine, would have significant impacts on private property owners—impacts which were not even considered by the Ninth Circuit in *TSPC I*. First, land use applications can carry hefty price tags. Some cities and counties charge thousands of dollars in fees just for the privilege of asking for an amendment to the land use law.

Second, the cost of developing the information needed to support an

198. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987) (once court determines that a taking has occurred, government retains the option of amending the offensive regulation).

199. *Penn Central*, 438 U.S. at 124.

200. The only opinion holding that a just compensation claim based on the failure of a regulation to substantially advance a legitimate state interest requires a concomitant showing of deprivation of economically viable use, Griffin Homes, Inc. v. City of Simi Valley, 280 Cal. Rptr. 792 (1991), was ordered depublished by the California Supreme Court. This is the same California Court of Appeal which held that the California Coastal Commission's exaction in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), did *not* violate the United States Constitution. In *Nollan*, Justice Scalia noted that the Court of Appeal's views were inconsistent "with the approach taken by every other court that has considered the question." 483 U.S. at 839.

201. 911 F.2d 1331 (1990).

202. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (*TSPC II*), 938 F.2d 153, 157 (9th Cir. 1991).

application to amend a land use statute or ordinance can be enormous. Most general land use laws in California (called "general plans") consist of hundreds of pages of detailed policy and environmental analysis prepared by professional land use planners and funded by tax dollars. California actually requires all general plans to contain a number of mandatory elements, including the impact of land use designations on housing, conservation, noise, safety, open space, and transportation.[203] A general plan amendment application, which would have been required by the Ninth Circuit's decision, would have to address these mandatory elements. Private property owners, the majority of whom are middle-class families on fixed budgets, should not be required to hire environmental consultants and experts at astronomical fees in order to "formally" request an amendment to a land use law.

If the property owner's amendment application did not include this type of detailed policy and environmental analysis, what would prevent a governmental entity from refusing to even *consider* the application? If the application were deemed incomplete for this reason, the property owner would *never* be able to seek just compensation for a regulatory taking because the case would never be ripe.

The substantial amount of time it would take to submit a complete amendment application also raises statute of limitations problems. In *TSPC I*, the property owners were faced with a 60-day statute of limitations to initiate litigation "arising out of the adoption or amendment of the regional plan."[204] It would be virtually impossible to gather the necessary information for an amendment application in such a short period of time, especially in California, where it often takes *years* for cities and counties to amend their general plans.[205]

Finally, some local governments in California have adopted ordinances and charter amendments which require *voter approval* for any amendment to the general plan. Property owners who request such amendments are often required to personally pay for the cost of special elections. One such charter amendment was adopted by the voters of Monterey, California.[206] Proper-

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203. *See* CAL. GOV'T CODE § 65302 (West 1992).

204. *See* California-Nevada Tahoe Regional Planning Compact, art. VI(j)(4), Pub. L. No. 96-551, 94 Stat. 3233 (1980); CAL. GOV'T CODE §§ 66800-66801 (West 1992); NEV. REV. STAT. §§ 277.190-277.200.

205. *But see* Stephans v. Tahoe Regional Planning Agency, 697 F. Supp. 1149, 1154 n.2 (D. Nev. 1988): "Since this Court finds that the TRPA has not yet taken '*final* action' with respect to Plaintiff's property, Plaintiff's taking claim is not barred by the Compact's statute of limitations. Hence, if Plaintiff is unable to gain redress through TRPA's administrative avenues, she may then pursue her taking claim through a ripe and timely complaint." *Id.*

206. The charter amendment reads in full:

> *Section 9.1 Voter Approval.*
> The City Council shall first secure voter approval of any proposed amendment to any element of the General Plan of the City or any amendment to the Zoning Ordinance of the City, as approved on November 1, 1990, which does any of the following:
> (1) Increases residential density,
> (2) Increases allowable floor area,

ty owners in these jurisdictions would have to pay for a special election before their Fifth Amendment just compensation claims would be ripe for judicial review.[207]

These common sense concerns were completely ignored by the Ninth Circuit in *TSPC I*, which focused solely on the fact that "TRPA specifically invites amendment proposals and promises action on them within a reasonable time."[208]

This simplistic, rigid view of the land use legislative process fails to recognize the due process rights of property owners. Perhaps this was the result to an inherent belief that the constitutional rights of property owners are of collateral importance: "Suffice it to say that even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and that few of us would put equal value on the first and the third."[209]

Aside from these public policy omissions, the Ninth Circuit in *TSPC I*

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(3) Changes the use designation or zoning of residential land to a more intensive use,
(4) Increases the maximum permitted height in any zone,
(5) Reduces the minimum required usable open space,
(6) Rezones existing open space, or
(7) Allows or facilitates
a) annexations which involve any commercial prezoning or,
b) annexations which involve residential prezoning resulting in a density greater than R-1-20000.

Section 9.2 Procedure.

The proposed amendment or annexation referred to in Section 9.1 shall be heard by the City Council in the usual manner for such actions. At the conclusion of hearings to consider an amendment to the General Plan or Zoning Ordinance, or to allow or facilitate annexation, the Council shall approve or deny the proposed action. If the action is approved, the Council shall immediately stay implementation of the action pending approval by the voters, and shall set the matter for determination by the electorate. *Any election shall be paid for by the applicant.* No election shall be required in the case of denial of proposed actions. This section shall not be construed to limit the power of the Council to approve, deny, or modify any proposed amendment or annexation.

The Council may set the election at any general election or special election. The Council shall adopt the amendment or annexation approved by the electorate without change at the next regular or adjourned meeting of the Council following certification of the election results.

Nothing in this article shall be construed to limit the power of City council to adopt more stringent land use regulations, moratoriums, or allocation of resource regulations. (Emphasis added.)

207. Concededly, a local government must first establish a general plan amendment procedure before *TSPC I* would apply. As the Court noted, "[c]rucial to our decision is the fact that TRPA specifically invites amendment proposals and promises action on them within a reasonable time." 911 F.2d at 1337. Most local governments have already implemented these procedures. *TSPC I* certainly provides an incentive for those which have not.

208. *TSPC I*, 911 F.2d at 1337. Recall that in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) the United States Supreme Court required courts to "evaluate both the fitness of the issues for judicial decision and the *hardship to the parties* of withholding court consideration" when addressing ripeness issues. *Id.* at 149 (emphasis added).

209. *TSPC I*, 911 F.2d at 1338 n.5.

mistakenly argued that its holding was consistent with *Williamson County*'s requirement that a property owner obtain a "final decision regarding the application of the regulations to the property at issue."[210] Crucial to this reading of *Williamson County* is the belief that a property owner must utilize *any* mechanism which provides relief from the terms of a regulation. As the Ninth Circuit said, "[w]e find nothing in the Compact that prevents property owners from using this amendment procedure to obtain the *same results* they could obtain by way of variance; thus, we are unable to draw any distinction between the two forms of relief that is not purely formal."[211]

There are several reasons (public policy notwithstanding) why a distinction should be drawn between a variance procedure and an amendment procedure. A variance provides relief *from the application* of a land use regulation. This is perfectly consistent with *Williamson County*'s requirement that a property owner obtain a final decision regarding the "application" of a land use regulation to his or her property.[212] For this reason, the granting of a variance is an adjudicatory function.[213]

The adoption and amendment of a general land use plan, on the other hand, is a legislative function.[214] *TSPC I* would have required a property owner to seek legislative relief through an amendment to the land use law itself, as opposed to adjudicatory relief by means of a variance from the application of the land use law.

To illustrate the absurdity of this requirement, consider its possible application outside the land use context. Suppose the City of Chicago adopted an ordinance which on its face prohibited blacks from becoming city attorneys.[215]

Suppose further that the City of Chicago set up a procedure whereby aggrieved blacks could request an "amendment" to this ordinance, for a modest fee of $5,000. Would any court in its right mind dismiss a lawsuit challenging the validity of this discriminatory policy because the plaintiff did not first pay $5,000 to request the Chicago City Council to change its mind? The obvious answer is no.

Yet why does the result differ simply because the plaintiff is asserting the constitutional right to make reasonable use of property? The only

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210. Williamson County Regional Planning Comm'n v. Hamilson Bank, 473 U.S. 172, 186 (1985).

211. *TSPC I*, 911 F.2d at 1337 (emphasis added).

212. *Williamson County*, 473 U.S. at 186.

213. *See* Arnel Development Co. v. City of Costa Mesa, 28 Cal.3d 511, 518 (1980).

214. "[E]very California decision on point . . . has held that the enactment or amendment of a zoning ordinance is a legislative act." Arnel Development Co. v. City of Costa Mesa, 28 Cal. 3d 511, 517 (1980). The enactment or amendment of a general plan is likewise a legislative act. *See* Yost v. Thomas, 36 Cal.3d 561, 570 (1984).

215. The plaintiffs in *TSPC I* contended that the general land use plan *on its face* resulted in a taking of private property without just compensation. *TSPC I*, 911 F.2d at 1333. *TSPC I* notwithstanding, courts have never applied a traditional "ripeness" analysis to facial just compensation claims. *See* cases cited in note 255, *infra*.

plausible explanation, one which the Ninth Circuit in *TSPC I* commendably revealed,[216] is that property rights, as opposed to other constitutional rights, simply don't merit the care and attention of the federal courts.

Judge Kozinski, in a scathing dissent, addressed the fallacy of a ripeness rule requiring an application for amendment to the land use law itself, especially when combined with the *Williamson County* "finality" requirement:

> An amendment . . . requires an exercise of political judgment. Political processes are, by their nature, infinite. A change in the makeup of the legislative body, a shift in the political winds, or even a change in attitude based on further experience or additional wisdom, may be a sufficient reason for a political body to change its mind. In fact, a political body needs no ascertainable reason at all for changing course; it is constrained only by the Constitution and the principles of political accountability. There is thus no way for a court to say that a legislative process has come to rest with respect to a challenged law.[217]

The distinction between "legislation" and "adjudication" is in fact the logical edifice which supports the Supreme Court's insistence that the Fifth Amendment is designed "'not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'"[218]

If the enactment of a regulation results in a taking, that regulation "necessarily implicates the 'constitutional obligation to pay just compensation.'"[219] The governmental entity, if it chooses, can then amend or repeal the intrusive regulation.[220] This converts the taking to a temporary or lesser one.[221] A taking nevertheless results and no case suggests that a property owner, to obtain compensation, must first formally ask the government to amend or repeal the regulation. The rationale underlying the Ninth Circuit's per curiam opinion—a rationale which requires affected property owners to beseech the government to amend or repeal its intrusive regulation as a condition to compensation—totally fails to mesh with the

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216. *See supra* note 209.

217. *TSPC I*, 911 F.2d at 1345-46 (Kozinski, J., dissenting) (footnote omitted).

218. Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11 (1990) (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987) (emphasis in original)). *See also* Corn v. City of Lawndale Lakes, 904 F.2d 585, 587 ("A regulation may meet the standards necessary for exercise of police power but still result in a compensable taking.")

219. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. at 315 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

220. *Id.* at 321.

221. *Id.* at 317-18.

concepts articulated by the Supreme Court in *First Church.*[222]

Curiously, only one year before *TSPC I*, the Ninth Circuit concluded that a property owner need *not* apply for an amendment to the general land use law. In *Hoehne v. County of San Benito*,[223] the property owners submitted an application for the subdivision of a 60-acre parcel into 4 separate lots with the intention of building their retirement home on one of the lots.[224] This application was consistent with the county's zoning ordinance, which permitted single-family residences with a five-acre lot size.[225] After denying the subdivision application,[226] the county amended its general plan and zoning ordinance to permit only 40-acre minimum lot sizes.[227] The District Court resolved the property owners' inverse condemnation action by granting the county's motion for summary judgment, in part because the application rejection was not "final."[228]

The Ninth Circuit reversed. In rejecting the county's argument that the property owners were required to apply for an amendment to the general plan's slope density requirements, the court emphasized the fact that it "would have been futile for the Hoehnes to seek a General Plan amendment in their favor, because supervisors had amended the General Plan in a manner *clearly and unambiguously adverse to the application of the landowners.*"[229] The Court went on to note that the "act of rezoning," which is legislative in nature, "is the strongest possible, if not irrefutable, indication that the County is opposed to any subdivision of this land."[230]

The *Hoehne* court did not hold that a property owner is *never* required

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222. Prior to *First Church*, there was great debate over the appropriate remedy for a taking. Governmental entities contended that the sole remedy was invalidation of the intrusive regulation. Property owners contended that just compensation was the appropriate remedy. *See* San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 628 (1981).

The property owners' principal argument (aside from the fact that the Fifth Amendment expressly requires just compensation) was one of public policy: vital governmental programs, which would otherwise be accomplished by means of eminent domain, should not be "invalidated" simply because the property owner has been deprived of a "stick" in his property rights "bundle." For a thorough development of this argument, *see* Giedeon Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty, in* PROCEEDINGS OF THE INST. ON PLAN. ZONING & EMINENT DOMAIN 177 (1980).

The Ninth Circuit's per curiam opinion in *TSPC I*, which would have required property owners to apply for an amendment to the land use law, could very well resurrect this debate.

223. 870 F.2d 529 (9th Cir. 1989).

224. *Id.* at 530.

225. *Id.*

226. The San Benito County Planning Commission denied the application for two reasons: the site was not physically suited for the proposed development because of excessive slope; and the proposed improvements were likely to cause environmental damage. The County Board of Supervisors affirmed the Planning Commission's decision, and added a third reason: the quantity of water would be inadequate in drought conditions. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 535 (emphasis added). *See also* Herrington v. County of Sonoma, 834 F.2d 1488, *amended* 857 F.2d 567 (1988) (general plan amendment not required because government planner testified that it would have "no chance" of being approved).

230. *Hoehne*, 870 F.2d at 535.

to apply for an amendment to the land use law itself. The court held that under the facts of the case, an amendment application would have been an "idle and futile act."[231] A different set of facts could have yielded a different result.

The case is significant, however, because it indicates that general land use laws can represent the "final" views of a local government. The fact that the Hoehnes' property was rezoned to a 40-acre minimum designation was sufficient, in and of itself, to establish "finality."[232] *Hoehne* thus stands for the general rule that amendment applications are "futile" when the express terms of the land use law conflict with the property owner's development proposal. This is to be contrasted with *Herrington*, wherein the Ninth Circuit refused to require a general plan amendment based on the testimony of the *government planner*, as opposed to the express terms of the land use law.[233]

As noted earlier, a different panel of the Ninth Circuit has expressly rejected the land use amendment requirement. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (TSPC II)*,[234] the Ninth Circuit, citing Judge Kozinski's dissent in *TSPC I*, held that "ripeness did not require the plaintiffs to amend the 1984 plan before bringing their claim."[235] It is doubtful, however, that this issue has been finally laid to rest.

F. Exhaustion of State Compensation Procedures

Williamson County created two separate "ripeness" requirements: finality with respect to the application of a land use law, and exhaustion of state compensation procedures. The latter requirement has been the sole ground for the dismissal of numerous constitutional property rights claims.[236]

The central inquiry is whether, at the time of the alleged taking, the state

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231. *Id.*

232. *Id.*

233. *See* note 169, *supra*.

234. 938 F.2d 153 (1991).

235. *Id.* at 157.

236. *See* Austin v. City and County of Honolulu, 840 F.2d 678 (9th Cir. 1988); Four Seasons Apartment v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985); Culebras Enter. Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987); Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986); Boothe v. Manatee County, 812 F.2d 1372 (11th Cir. 1987); Southern Pacific Transp. Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990); Cassettari v. County of Nevada, 824 F.2d 725 (9th Cir. 1987); Jama Const. v. City of Los Angeles, 938 F.2d 1045 (9th Cir. 1991); Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991); Lerman v. City of Portland, 675 F. Supp. 11 (D. Me. 1987); Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 721 F. Supp. 1212 (N.D. Ala. 1989); Beachy v. Board of Aviation Comm'ns, 699 F. Supp. 742 (S.D. Ind. 1988); Martinez v. Junta de Planificacion de Puerto Rico, 736 F. Supp. 413 (D. P.R. 1990); Wintercreek Apartments of St. Peters v. City of St. Peters, 682 F. Supp. 989 (E.D. Mo. 1988); Calibre Spring Hill, Ltd. v. Cobb County, 715 F. Supp. 1577 (N.D. Ga. 1989); Abbiss v. Delaware Dept. of Transp., 712 F. Supp. 1159 (D. Del. 1989).

has an adequate mechanism for providing just compensation. If no such mechanism is available, the property owner may bring suit directly in federal court.[237]

In *Corn v. City of Lauderdale Lakes*,[238] for example, the Court of Appeals held that the property owner was entitled to bring suit directly in federal court because at the time of the alleged taking the Florida Supreme Court believed that equitable relief was the "exclusive remedy" for confiscatory zoning regulations.[239] Similarly, in *Sierra Lake Reserves v. City of Rocklin*,[240] the Ninth Circuit Court of Appeals held that a rent control challenge could be brought directly in federal court because state appellate courts "explicitly rejected compensation."[241]

Even if the state has not indicated whether just compensation is an available remedy, courts have held that, absent explicit language rejecting just compensation, property owners must first exhaust state compensation procedures.[242]

Williamson County's second "ripeness" requirement has several problematic aspects. First, because it revolves around "compensation," it should not apply when the property owner is seeking other forms of relief. In *Nollan v. California Coastal Commission*,[243] the Nollans did not seek "just compensation" when the California Coastal Commission attempted to "take" their beach without paying for it. The Nollans instead sought a writ of mandate to compel the California Coastal Commission to issue a building permit without the extortive condition.[244]

In this circumstance, the property owner should be able to file a declaratory relief action directly in federal court. The procedural posture would be analogous to the plaintiffs' claim in *Duke Power Company v.*

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237. Of course, all states must now provide just compensation for regulatory takings. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). Prior to *First Church*, however, a number of states only allowed for equitable relief. If the alleged taking occurred in one of these states prior to *First Church*, the property owner may file directly in federal court. As the Supreme Court stated in *Williamson County*, "all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the [alleged] taking." Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (citations omitted).

238. 816 F.2d 1514 (11th Cir. 1987).

239. *Id.* at 1517. *See also* Del Monte Dunes at Monterey v. City of Monterey, 920 F.2d 1496, 1507 (1990); Furey v. City of Sacramento, 780 F.2d 1448, 1450 n.1 (9th Cir. 1986); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1201 (N.D. Cal. 1988).

240. 938 F.2d 951 (9th Cir. 1991).

241. *Id.* at 955.

242. *See Austin*, 840 F.2d at 681 ("[a]lthough we find no case that recognizes inverse condemnation as a cause of action, neither do we find one that rejects it"); *Southern Pacific Transportation Co.*, 922 F.2d at 505 n.8 ("[c]laimants are required to seek compensation in state courts before filing federal complaints even when state remedies are uncertain and undeveloped"); *Littlefield*, 785 F.2d at 609.

243. 483 U.S. 825 (1987).

244. *Id.* at 828.

Carolina Environmental Study Group, Inc.[245] In that case, the plaintiffs sought a declaration that the Price-Anderson Act, which imposed a $560 million limitation on liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants, was unconstitutional.[246]

The Supreme Court held that the Price-Anderson Act did not "take" plaintiffs' property, nor did it deprive the plaintiffs of due process and equal protection of laws.[247] Before reaching this conclusion, however, the Court addressed the question of whether the "taking" claim could only be adjudicated in Claims Court, pursuant to the Tucker Act.[248] The Court pointed out that the claim did not need to be brought in Claims Court provided plaintiffs were seeking declaratory relief, not damages:

> Mr. Justice Rehnquist suggests that appellees' 'taking' claim will not support jurisdiction under [28 U.S.C. § 1331(a)], but instead that such a claim can be adjudicated only in the Court of Claims under the Tucker Act. . . . We disagree. *Appellees are not seeking compensation for a taking*, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgment. . . . While the Declaratory Judgment Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.[249]

This reasoning should apply with equal force to the *Williamson County* requirement that a property owner first seek "compensation" in state court. If the taking claim seeks only declaratory relief, or other equitable remedy, and not "compensation," then the property owner should be able to file suit directly in federal court. Several courts have addressed the merits of the taking claim when declaratory or injunctive relief, and not compensation, is the remedy sought.[250]

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245. 438 U.S. 59 (1978).

246. *Id.* at 67.

247. *Id.* at 87, 94.

248. 28 U.S.C. § 1491 (1990) ("[t]he United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution").

249. *Duke Power Co.*, 438 U.S. at 71 n.15 (emphasis added); *see also* Ohio Student Loan Comm'n v. Cavazos, 900 F.2d 894, 898 n.1 (6th Cir. 1990) (Tucker Act inapplicable because plaintiffs were seeking declaratory and injunctive relief, not monetary damages); Hahn v. United States, 757 F.2d 581, 588 (3d Cir. 1985) (federal District Court, not Claims Court, retains jurisdiction over nonmonetary claims); State of Tennessee *ex rel.* Leech v. Dole, 749 F.2d 331, 336 (6th Cir. 1984) ("a claim is only cognizable under the Tucker Act if it is for money damages and is based on a source of substantive law mandating compensation by the Federal Government"); State of Minnesota v. Heckler, 718 F.2d 852, 858 (8th Cir. 1983); Smith v. United States, 654 F.2d 50, 52 (Cl. Ct. 1981); Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981).

250. *See, e.g.*, Mountain Water Company v. Montana Dep't of Public Service Regula-tion, 919 F.2d 593 (9th Cir. 1990); Hoffman v. City of Warwick, 909 F.2d 608 (1st Cir. 1990). *But see* Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir., 1991): "'[T]he [*Williamson*] Court's ripeness analysis would be completely neutered if its holding were applied to damage claims

This conclusion is supported by *New Orleans Public Service, Inc. v. Council of City of New Orleans*,[251] where the United States Supreme Court acknowledged that a declaratory relief action brought by a utility company directly in federal court was "no different in substance from a facial challenge to an allegedly unconstitutional statute or zoning ordinance—*which we would assuredly not require to be brought in state courts.*"[252]

Indeed, in a line of cases stretching from *Village of Euclid v. Ambler Realty Co.*[253] to *Keystone Bituminous Coal Association v. DeBenedictis*[254] the Supreme Court has consistently addressed the merits of "facial" just compensation claims without applying the traditional "as-applied" ripeness test.[255]

It would be especially absurd to apply the "exhaustion of state compensation procedures" requirement to declaratory relief claims involving the failure of a regulation to substantially advance a legitimate governmental interest. Suppose, for example, the government imposes a commercial development "fee" of $5 per square foot for the purchase of avant-garde art to be located in a public park ten miles from the development. If the property owner successfully argues that this type of "fee" is facially unconstitutional in light of *Nollan v. California Coastal Commission*,[256] the obvious remedy would

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alone.'" *Id.* at 64 (quoting Golemis v. Kirby, 632 F.Supp. 159, 164 (D.R.I. 1985).

251. 491 U.S. 350 (1989).

252. *Id.* at 372 (emphasis added) (citation omitted).

253. 272 U.S. 365 (1926).

254. 480 U.S. 470 (1987).

255. The *Keystone* Court (quoting Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. at 294-96), emphasized the distinction between "as-applied" and "facial" just compensation claims:

> 'Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the [Surface Mining Control and Reclamation] Act to particular surface mining operations or its effect on specific parcels of land. Thus, *the only issue properly before . . . this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking.*

Keystone, 480 U.S. at 495 (quoting *Agins*, 447 U.S. at 260) (emphasis added); *see also* Yee v. City of Escondido, 112 S. Ct. 1522, 1532 (1992) (facial challenge ripe for review); Martino v. Santa Clara Valley Water District, 703 F.2d 1141, 1146-47 (9th Cir. 1983) ("the failure to submit a development plan is not, in and of itself, a bar to an attack on the ordinance on 'its face'"); Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977 (9th Cir. 1987), *amended*, 841 F.2d 872, 877 (1988) (District Court "properly recognized the [property owner] may challenge the zoning restriction on the basis that the mere 'enactment' of the restriction constitutes a taking of its property"); Beacon Hill Farm Assoc. v. Loudoun County Board of Supervisors, 875 F.2d 1081, 1084-85 (4th Cir. 1989); Eide v. Sarasota County, 908 F.2d 716, 724 n.14 (11th Cir. 1990); Fry v. City of Hayward, 701 F. Supp. 179, 181 (N.D. Cal. 1988); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1200 (1988); Crow-New Jersey 32 Limited Partnership v. Township of Clinton, 718 F. Supp. 378, 381-83 (D. N.J. 1989).

However, in *Southern Pacific Transportation Co.*, 922 F.2d 498, the Ninth Circuit extended *Williamson County*'s "exhaustion of state compensation procedures" requirement to facial challenges. *Id.* at 505-07.

256. 483 U.S. 825 (1987).

be invalidation of the ordinance which established the fee. It would be unreasonable to insist that the ordinance itself is constitutional, and that the property owner's only remedy is "just compensation" by way of a refund of the $5 per square foot fee.[257]

There is a risk, however, that the federal courts will dismiss an inverse condemnation action seeking declaratory relief on the ground that the United States Constitution does not prohibit a taking, but rather prohibits a taking without "just compensation."[258] Thus, it might be argued, a court cannot determine whether or not a "taking" has occurred unless the property owner has unsuccessfully attempted to secure compensation from the state.

On the other hand, it makes little sense to require property owners to seek just compensation from the *courts*, as opposed to the governmental entity which imposed the regulation. The better approach is to allow property owners the right to litigate directly in federal court once the *governmental entity* denies just compensation.

Williamson County's second "ripeness" requirement also raises troubling questions regarding res judicata and collateral estoppel.[259] What is to prevent a federal district court from dismissing an inverse condemnation action because the taking claim has already been defeated in state court? This is precisely what occurred in *Yee v. City of Escondido*.[260]

In *Yee*, the property owner contended that an initiative measure which imposed rent controls on mobile home parks resulted in a taking of property without just compensation.[261] A parallel action filed in federal court was stayed pending exhaustion of all state court remedies.[262] After the California Court of Appeal held that the initiative measure did not result in a taking, and after the California Supreme Court denied review, the property owner pursued the parallel federal action. Remarkably, the District Court dismissed the action, citing the res judicata effect of the state court judgment.[263]

The United States Supreme Court might have known that its "exhaustion of state remedies" requirement would effectively close the federal courthouse

257. Of course, if the property owner successfully pursued an as-applied challenge to the $5 per square foot fee, just compensation would be the mandated remedy for a "temporary taking." *But see* Moore v. City of Costa Mesa, 886 F.2d 260. (No just compensation required for taking based on failure of a regulation to substantially advance legitimate governmental interests).

258. *See Williamson County*, 473 U.S. at 194.

259. Res judicata means "claim preclusion." It prevents a plaintiff from seeking further relief on the same claim in a separate action. Collateral estoppel means "issue preclusion." It bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. *See* 18 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURES § 4402 (1981).

260. 224 Cal. App. 3d 1349 (1990), *affirmed* 112 S. Ct. 1522 (1992).

261. *Id.* at 1352.

262. *Id.* at 1351 n.1.

263. United States District Court, Southern District, No. CV-89-0234-B (CM). The United States Supreme Court subsequently affirmed the decision of the California Court of Appeal. *See* Yee v. City of Escondido, 112 S. Ct. 1522 (1992).

doors to aggrieved property owners.[264] While the Supreme Court has not yet overruled *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*,[265] which made the Just Compensation Clause applicable to the states through the Fourteenth Amendment, the res judicata effect of final state court judgments could do just that.

Solutions to this judicially created quagmire are few and far between. The property owner could file an inverse condemnation action directly in federal court and allege a violation of the federal constitution and, by way of pendant jurisdiction, a violation of the state constitution.[266] This would conserve judicial resources, avoid protracted litigation, and ensure the continued applicability of the federal Just Compensation Clause to overzealous state land use regulations.

G. Substantive Due Process and Equal Protection Challenges

Because *Williamson County* and *MacDonald, Sommer & Frates* relate solely to just compensation claims involving deprivation of economically viable use,[267] lower courts have had to determine whether the myriad ripeness requirements of these cases also apply to substantive due process and equal protection challenges.

This issue will become increasingly important if more and more courts

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> If increased state autonomy and reduced federal case loads can be purchased only with the coin of more constitutional violations and fewer constitutional remedies, the price is high. . . . If we want to nominate a particular group of cases for exclusion from the federal courthouse, we should look at groups in which federal law is not sensitively at issue rather than at one in which fundamental constitutional rights are at stake.

Speech of Justice Harry A. Blackmun at the New York University School of Law (Nov., 1984), *quoted in* David A. Kaplan, *Justice Blackmun, in Talk, Makes a Plea for Sec. 1983*, 7 NAT'L L. J., at 23, col. 1 (1984).

265. 166 U.S. 226 (1897).

266. The Ninth Circuit suggested this procedure in Lockary v. Kayfetz, 908 F.2d 543 (9th Cir. 1990). In that case, the Court of Appeals dismissed a precondemnation blight taking claim because the property owners did not first attempt to procure relief in state court. The court noted, however, that on remand the District Court may permit the property owners to amend their complaint to include a pendant state law precondemnation blight claim. *Id.* at 549. *See also* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404 n.4 (9th Cir. 1989) ([a]lthough plaintiffs' taking claim is not ripe for our review, it would be entirely appropriate on remand for the district court, in the interest of judicial economy . . . to permit plaintiffs to amend their complaint to include a pendent state law taking claim).

267. In *Williamson County*, the Supreme Court noted that substantive due process and equal protection challenges were not at issue. 473 U.S. at 182 n.4. The Court's discussion of the Due Process Clause was limited to the government's contention that the remedy for a taking was invalidation of the restrictive land use regulation, and not just compensation. *Id.* at 197-200. This argument was of course rejected in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

Similarly, in MacDonald, Sommer & Frates v. County of Yolo, the Supreme Court's discussion of ripeness was limited to regulatory takings claims. 477 U.S. 348 (1987).

direct their creative energy toward abolishing substantive review of just compensation claims. Should the trend continue, property owners may be tempted to take the easier route of seeking judicial review of substantive due process and equal protection claims. They might accordingly abandon their effort to obtain "just compensation" for burdensome governmental regulations.

This approach carries with it great risk. Substantive due process analysis is limited to a determination of whether the governmental action is "arbitrary and capricious" under a rational basis standard.[268] The "takings" test, however, mandates a heightened level of judicial scrutiny.[269] The "takings" test also mandates just compensation whenever the property owner suffers a deprivation of economically viable use, irrespective of the regulation's "validity" as an exercise of the police power.

As noted above, *Williamson County*'s first ripeness requirement is that the property owner receive a final decision from the government regarding the application of regulations to a specific development proposal. Lower courts have uniformly held that this ripeness requirement applies to substantive due process and equal protection claims.[270] It is important to emphasize, however, that this requirement is distinct from the question of whether the property owner must also exhaust administrative remedies. The *Williamson County* Court expressly stated that substantive due process claims may be brought *without* exhaustion of administrative remedies.[271]

Williamson County's second ripeness requirement, exhaustion of state compensation procedures, is not applicable to due process and equal protection claims. This is because the Due Process and Equal Protection Clauses, unlike the Just Compensation Clause, do not contain provisions validating the challenged governmental action upon the payment of just compensation. The government is prohibited from denying due process and equal protection of the laws, *whether it provides for just compensation or not*. As the Supreme Court noted, "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied."[272]

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268. "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 (1980) (citations omitted).

269. *See* Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

270. *See* Norco Const. Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986); Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1455-56 (D.C. Cal. 1985); Shelter Creek Development Corporation v. City of Oxnard, 838 F.2d 375, 379 (9th Cir. 1988); Herrington v. County of Sonoma, 834 F.2d 1488 (1987), *amended in part*, 857 F.2d 567, 569 (1988); Unity Ventures v. County of Lake, 841 F.2d 770, 775 (7th Cir. 1988); St. Clair v. City of Chico, 880 F.2d 199, 202 (9th Cir. 1989).

271. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. at 192-93. *See also* Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982).

272. *Williamson County*, 473 U.S. at 194 n.13 (emphasis in original).

The Ninth Circuit acknowledged the inapplicability of the "exhaustion of state compensation procedures" requirement to due process and equal protection claims in *Sinaloa Lake Owners Association v. City of Simi Valley*.[273] The property owners in *Sinaloa* filed an inverse condemnation and due process action against the defendant when it breached a privately owned dam.[274] The defendant contended that the due process claim was not ripe because the property owners had not first exhausted state compensation procedures.[275] The Ninth Circuit disagreed:

> As a threshold matter, we reject defendants' contention that the second prong of *Williamson County* requires exhaustion of available state compensation remedies before plaintiffs may pursue their due process claim in federal court. This requirement, derived from 'the special nature of the Just Compensation Clause,' [*Williamson County*, 473 U.S. at 196 n.14], states only that the just compensation clause cannot be violated until the state has subsequently declined to pay for the taking; *it has no application to other types of constitutional claims*, even where those claims arise out of facts that also give rise to a taking claim.[276]

Equally inapplicable to due process and equal protection claims is the *MacDonald, Sommer & Frates* requirement that a property owner obtain a "final and authoritative determination of the type and intensity of development legally permitted on the subject property."[277] This requirement relates solely to just compensation claims involving the deprivation of economically viable use, where courts must determine whether the regulation has gone "too far."[278] Due process and equal protection claims, on the other hand, are not predicated on the regulation's economic effect. They are directed instead toward arbitrary and capricious government action.

This has been the conclusion of every lower court which has addressed the issue. In *Eide v. Sarasota County*,[279] for example, the property owner filed a due process and equal protection challenge against the local government when it denied an application for commercial rezoning. Although the

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273. 882 F.2d 1398 (1989).

274. *Id.* at 1401.

275. *Id.* at 1404.

276. *Id.* (emphasis added). *See also* Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1574 n.8 (11th Cir. 1989) ("[a] property owner has been denied substantive due process . . . the moment a governmental decision affecting his property has been made in an arbitrary and capricious manner, regardless of whether he is later compensated for that violation"); Eide v. Sarasota County, 908 F.2d at 725-26 n.16; Schnuck v. City of Santa Monica, 935 F.2d 171 (9th Cir. 1991) (court addressed the merits of the due process and equal protection claims, but dismissed the just compensation claim for failure to exhaust state compensation procedures).

277. MacDonald, Sommer & Frates, 477 U.S. at 348.

278. *Id.* The reference is to Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In that case, Justice Holmes recognized that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

279. 908 F.2d 716 (11th Cir. 1990).

Court of Appeals dismissed the claims as unripe,[280] it was careful to note that *MacDonald, Sommer & Frates* was in no way controlling:

> [W]ith respect to an as applied arbitrary and capricious due process claim, the final decision hurdle is satisfied when the first prong [of *Williamson County*] is met—i.e., when the zoning decision being challenged is finally applied to the property. Thus, in an as applied arbitrary and capricious due process claim challenging a zoning decision denying commercial zoning, the landowner need only obtain a final decision denying commercial zoning. The *MacDonald* requirement does not apply to Eide's as applied arbitrary and capricious due process claim because Eide does not allege the deprivation of all beneficial use of his land, and, therefore, a court does not need the additional determination in order to adjudicate his claim.[281]

The same reasoning forms the basis of the argument that *MacDonald, Sommer & Frates* should not be applied to just compensation claims involving regulations which fail to substantially advance legitimate governmental interests, or which frustrate reasonable investment-backed expectations. These just compensation claims, like due process and equal protection claims, do not require a showing of "deprivation of all beneficial use."[282]

In order to capitalize on this logical distinction, property owners must clearly articulate the type of just compensation claim being pursued. Unless this is done, courts may require the property owner to comply with both *Williamson County* and *MacDonald, Sommer & Frates*.

H. The Futility Exception

Prior to *Williamson County*, several courts referred to a "futility exception" to the ripeness doctrine.[283] It was not until Justice White's

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280. The property owner had failed to submit a single plan for the commercial development of his properties. For this reason, the Court of Appeals dismissed the case as unripe, citing *Williamson County*'s first prong. *Eide*, 908 F.2d at 726.

281. *Id.* at 725 n.16. *See also* Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991); Greenbriar, Ltd. v. City of Alabaster, 881 F.2d at 1576 n.11:

> [A] determination of precisely what use is permitted is of great relevance in ascertaining whether a taking has occurred. By contrast, a substantive due process claim requires a demonstration that a decision is arbitrary and capricious. Discerning what alternative uses are permitted would not seem to be significant in assessing the arbitrariness of zoning decisions, although . . . it clearly is relevant in determining what damages result from an arbitrary decision.

282. Like *Williamson County*, *MacDonald, Sommer & Frates* only involved the "deprivation of economically viable use" prong of the takings test. The Supreme Court has never applied its "ripeness" analysis to the other two prongs of the takings test.

283. *See* American Savings and Loan Assoc. v. County of Marin, 653 F.2d 364, 371 (9th Cir. 1981) (property owner need not submit development application if compliance with local ordinances would be futile); Dahl v. City of Palo Alto, 372 F. Supp. 647, 649 (N.D. Cal. 1974) (request for variance would be a "useless course" where development would be completely contrary to the goal of preserving land in its natural state); Ogo Assoc. v. City of Torrance, 37 Cal. App. 3d 830, 834 (1974) (to require property owners to apply for a variance would be to

dissent in *MacDonald, Sommer & Frates*, however, that courts began discussing the futility exception as an essential element of the ripeness doctrine.

In Justice White's view, the government can indicate its "final" decision with respect to a development proposal without issuing an explicit denial.[284] As long as the government expresses its position to the property owner, the ripeness doctrine will not require the submission of one or more applications.[285] As Justice White stated:

> Nothing in our cases . . . suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position.
>
> Moreover, I see no reason for importing such a requirement into the 'final decision' analysis. A decisionmaker's definitive position may sometimes be determined by factors other than its actual decision on the issue in question. For example, if a landowner applies to develop its land in a relatively intensive manner that is consistent with the applicable zoning requirements and if the governmental body denies that application, explaining that all development will be barred under its interpretation of the zoning ordinance, I would find that a final decision barring all development has been made—even though the landowner did not apply for a less intensive development. Although a landowner must pursue reasonably available avenues that might allow relief, it need not, I believe, take patently fruitless measures.[286]

In Justice White's view, the "ripeness" requirements of both *Williamson County* and *MacDonald, Sommer & Frates* could be satisfied upon a showing of futility. Although the above quote focuses primarily on the "reapplication" requirement of *MacDonald, Sommer & Frates*, Justice White was initially responding to the argument that a "definitive position" under *Williamson County* could only be obtained through a rejected development application.

This issue surfaced in a significant futility exception case: *Kinzli v. City of Santa Cruz*.[287] In *Kinzli*, the voters of the City of Santa Cruz (City) adopted an initiative which limited the Kinzlis' property to a variety of open space uses, including timber production, agriculture, and wildlife habitat.[288] The initiative also prevented the City from providing urban services to the property.[289] The Kinzlis attempted to sell the property under a contract which mandated the receipt of permits from the City for residential

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require them to "pump oil from a dry hole").

284. *MacDonald, Sommers & Frates*, 477 U.S. at 359 (White, J., dissenting).

285. *Id.*

286. *Id.*

287. 818 F.2d 1449 (4th Cir. 1987).

288. *Id.* at 1452.

289. *Id.*

development.[290] One potential purchaser filed a development application on behalf of the Kinzlis, but later abandoned it when he was told by a state staff engineer that the City could not provide water service to the property.[291]

The Kinzlis subsequently filed suit, alleging violations of the Just Compensation, Due Process, and Equal Protection Clauses of the United States Constitution.[292] The District Court found the Kinzlis' suit ripe for adjudication, citing the futility exception, but nevertheless granted the City's motion for summary judgment.[293]

The Ninth Circuit reversed the judgment of the District Court, and dismissed the suit on ripeness grounds.[294] The Court concluded that the Kinzlis could not argue that it would have been "futile" to submit a development application because they had not yet applied for a development application: "The Kinzlis' taking claim . . . is not ripe: they have failed to secure a 'final decision' from the City regarding acceptable uses, and the futility exception does not excuse this failure since no 'meaningful application' has been made."[295]

The Court also noted that the futility exception would excuse *Williamson County*'s variance requirement only if "at least one 'meaningful application' for a variance is denied."[296] Because the Kinzlis did not submit an application for a variance they could not argue that it would have been futile to apply for a variance.[297]

This "reasoning," which has been labeled "oxymoronic" by one court,[298] effectively prohibits application of the futility exception to the first prong of the *Williamson County* ripeness test. Even though a government official informed the potential purchaser of the Kinzli property that the City could not legally provide water service, the Ninth Circuit still required the submission of a development application.

A number of courts have failed to recognize the inherent illogic behind the *Kinzli* rule, and have applied it in dismissing as unripe the just compensation claim.[299] *Kinzli* does not, however, foreclose application of the futility exception to the *MacDonald, Sommer & Frates* "reapplication" requirement.

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290. *Id.*

291. *Id.*

292. *Id.*

293. Kinzli v. Santa Cruz, 620 F. Supp. 609 (N.D. Cal. 1985) *rev'd* 818 F.2d 1449 (9th Cir. 1987), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied* 484 U.S. 1043 (1988).

294. *Id.*

295. *Kinzli*, 818 F.2d at 1455.

296. *Id.* at n.6.

297. *Id.*

298. Zilber v. Town of Moraga, 692 F. Supp. 1195, 1199 n.3 (N.D. Cal. 1988).

299. *See* Lake Nacimiento Ranch v. San Luis Obispo County, 830 F.2d 972, 980-81 (9th Cir. 1987); Unity Ventures v. Lake County, 841 F.2d 770, 774-76 (7th Cir. 1987); Southern Pacific Transportation Company v. City of Los Angeles, 922 F.2d 498, 504 (9th Cir. 1990). *But see* Herrington v. County of Sonoma, 834 F.2d 1488 (1987), *amended in part*, 857 F.2d 567 (1988).

The Court acknowledged that it "need not determine the point at which *reapplications* for development become futile."[300]

What facts must a property owner plead in order to establish futility? One case suggests that actual testimony by government officials is required. In *Herrington v. County of Sonoma*,[301] a case which admittedly only addressed due process and equal protection issues,[302] the Ninth Circuit held that a development proposal was "conclusively rejected" because of the testimony of a government planner.[303] The court expressly noted that its holding was based on this testimony alone.[304]

Although the *Herrington* court cited with approval *Kinzlis'* requirement that a development application first be submitted before the futility exception can apply, it reached the opposite conclusion. The court conceded that there was "some controversy as to whether the Herringtons submitted even one development application to the county, and as to whether their proposed 32-lot subdivision was conclusively rejected."[305] In light of the government planner's testimony, however, the court concluded that "[e]fforts to *complete* the development application, and application for a variance, would have been futile."[306] If the court had strictly enforced the *Kinzli* rule, it would have been impossible for the Herringtons to even argue "futility" until they had submitted a complete application. *Herrington* implicitly exposed the absence of logic in the *Kinzli* decision.

Other courts have applied the futility exception to requests which by law cannot be granted, or requests which conflict with unambiguous land use regulations.[307] Under this approach, the personal opinions of government employees are irrelevant.[308] The inquiry is focused instead on the intent of government as expressed in the laws it passes.[309] If the land use law only permits an application for "X," it would be futile as a matter of law for the property owner to seek an approval for "Y." In *Hoehne v. County of San Benito*,[310] for example, the Ninth Circuit held that a general plan amendment application would have been futile because the local government had already amended the general plan in a manner "clearly and unambigu-

300. *Kinzli*, 818 F.2d at 1455 (emphasis original).

301. 834 F.2d 1488 (1987), *amended in part*, 857 F.2d 567 (1988).

302. After a ten-day jury trial, the Herringtons abandoned their Fifth Amendment just compensation claims. 834 F.2d at 1493.

303. 857 F.2d at 570.

304. *Id.*

305. *Id.* at 569.

306. *Id.* at 570.

307. *See* Hoehne v. County of San Benito, 870 F.2d 529, 534 (9th Cir. 1989); *see also* text accompanying notes 170 and 229, *supra*.

308. *Id.*

309. *Id.*

310. *Id.* at 529, 533..

ously adverse to the application of the landowner."[311]

Kinzli and *Hoehne* represent two diametrically opposed approaches to the "futility exception." Under *Kinzli*, specific facts are irrelevant: as a matter of law, "futility" cannot be established until the property owner submits at least one "meaningful" development application and variance request.[312] Under *Hoehne*, however, "[o]nly the facts tell us whether a final decision has been reached."[313] One such "fact" would be the existence of a law which announces the government's view as to the acceptable use of property.[314] If a development application or variance request would require the government to deviate from the law it has created, it should not have to be submitted.

The United States Supreme Court recently weakened the precedential impact of *Kinzli*. In *Lucas v. South Carolina Coastal Council*,[315] the Court did *not* require the property owner to apply for a development application because "such a submission would have been pointless, as the [defendant] stipulated below that no building permit would have been issued under the 1988 Act, *application or no application*."[316] Submission of a development application is therefore *not* a prerequisite to application of the futility exception.

CONCLUSION

The procedural barriers facing property owners who wish to enforce their constitutional right to just compensation for overburdensome governmental regulations are becoming virtually insurmountable. *Agins* requires the submission of a development application. *Williamson County* requires a variance request and exhaustion of state compensation procedures. *MacDonald, Sommer & Frates* requires a potentially unlimited number of reapplications.

Even if a property owner can somehow chart this Kafkaesque maze of technical, expensive, and ultimately futile procedures, the game has only just begun. The property owner must now convince the court that a taking has occurred, which is another story in itself.

It is tempting, but perhaps overly simplistic, to lay the blame entirely on the courts. Tempting because our courts have long been of the view that property rights, in comparison with First Amendment freedoms, are just not that important. Simplistic because our legislators also pass laws with little, if any, concern for the impact on property rights. Our bureaucrats, with a

311. *Id.* at 535. For a more detailed discussion of *Hoehne*, *see* text accompanying note 226, *supra*.
312. *Id.*
313. *Id.* at 533.
314. *Id.*
315. 112 S. Ct. 2886 (1992).
316. *Id.* at 2891 n.3 (emphasis added).

boastful air, list the number of citizens who have been deprived of property without just compensation, like so many notches in a belt.[317]

For sound moral and political reasons the framers of the Constitution found it necessary to include property within the Bill of Rights, of which our courts are the ultimate guardian. As observed by Judge Kozinski, this fact alone is reason for solicitude, not "thinly disguised contempt," from members of the judiciary.[318]

317. In its Tenth Annual Report, the California Coastal Commission noted that over 2,000 property owners were required to dedicate part of their land in exchange for a building permit, without just compensation. *Coastal Access Program Tenth Annual Report,* Joint Rep. Cal. Coastal Commission and State Coastal Conservancy, at 16 (Jan. 1990).

318. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 911 F.2d at 1346 (Kozinski, J., dissenting), *rev'd* Tahoe-sierra Preservation Council v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991).