

# RIPENESS AND FORUM SELECTION IN FIFTH AMENDMENT TAKINGS LITIGATION\*

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## I. A MESSAGE UNHEARD, MISUNDERSTOOD, OR RESISTED

The 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*<sup>1</sup> imposed significant ripeness and forum selection requirements on Fifth Amendment takings claims.<sup>2</sup> The recent takings decisions of *Lucas v. South Carolina Coastal Council*<sup>3</sup> and *Dolan v. City of Tigard*<sup>4</sup> expand the rights of property owners. However, they have only a modest effect on the rules of ripeness and forum selection, which remain formidable hurdles in land use litigation. Although a spate of takings legislation offered around the country has emerged with the aim of further limiting public control over land use, these bills generally do not address ripeness and forum limitation issues.<sup>5</sup>

*Hamilton Bank* sets out a two prong test. The first prong—called the final decision requirement—requires a property owner to obtain a final decision from local land use authorities for an “as applied” challenge.<sup>6</sup> If dissatisfied with the development rights denied or limitations imposed in seeking a final decision, or if making a facial challenge, the second prong—called the compensation requirement—requires the property owner to seek compensation in the state courts.<sup>7</sup>

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1. 473 U.S. 172 (1985).

2. See *infra* text accompanying notes 243-54 (discussing due process and equal protection claims applicable to the ripeness doctrine). “The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides: ‘[N]or shall private property be taken for public use, without just compensation.’” *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (citations omitted).

3. 112 S. Ct. 2886 (1992). For general reference and additional citations on the basic takings law of the Fifth Amendment, see DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE, 222-355 (2d ed. 1994); DANIEL R. MANDELKER, LAND USE LAW, 19-75 (3d ed. 1993).

4. 114 S. Ct. 2309 (1994).

5. See *infra* note 257.

6. *Hamilton Bank*, 473 U.S. at 186.

7. *Id.* at 194.

The rationale of prong one is that a regulation is only a taking if it goes "too far," and a court cannot answer this question without knowing how far the regulation goes.<sup>8</sup> The second prong is based on the nature of the Fifth Amendment claim; the Constitution does not proscribe takings, only takings without compensation. To receive compensation, the property owner must initiate an inverse condemnation action.<sup>9</sup>

Despite these requirements, case reporters over the past decade are filled with suits that have been filed prematurely in both state and federal courts without a final decision from the local authorities.<sup>10</sup> The reporters also carry numerous instances of property owners seeking compensation directly from the federal courts.<sup>11</sup> This suggests that the requirements of *Hamilton Bank* have either not penetrated the consciousness of property owners and their lawyers, or that the property owners' affinity for federal court is so great that they are willing, against great odds, to spend their time and money attempting to fall within narrow exceptions to the rules.

In the 1993 decision of *Celentano v. City of West Haven*,<sup>12</sup> the property owner "insist[ed] emphatically" that he, like other civil rights litigants, did not need to seek final action.<sup>13</sup> The property owner cited as authority the United States Supreme Court's 1982 decision in *Patsy*

8. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348-49 (1986). For other discussions of the final decision rule, see R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. LAND USE & ENVTL. L. 101, 124-27 (1993); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

9. *MacDonald, Sommer & Frates*, 477 U.S. at 350.

10. See, e.g., *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1212 (11th Cir. 1995); *Southview Assocs. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992); *Jama Constr. v. City of Los Angeles*, 938 F.2d 1045 (9th Cir. 1991); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988).

11. See, e.g., *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 1995 WL 582169 (9th Cir. Apr. 4, 1995); *Restigouche, Inc.*, 59 F.3d at 1208; *Reahard v. Lee County*, 30 F.3d 1412, 1414 (11th Cir. 1994); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993); *Broughton Lumber Co. v. Columbia River Gorge*, 975 F.2d 616, 622 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 60 (1993); *J.B. Ranch, Inc. v. Grand Country*, 958 F.2d 306, 308 (10th Cir. 1992); *Jama Constr.*, 938 F.2d at 1047-48; *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); *Hoehne v. County of San Benito*, 870 F.2d 529, 531 (9th Cir. 1989); *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988). *But see* *Dodd v. Hood River County*, 59 F.3d 852, 860 (9th Cir. 1995) (stating "to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant").

12. 815 F. Supp. 561 (D. Conn. 1993).

13. *Id.* at 567; see also *Provident Mut. Life Ins. Co. v. City of Atlanta*, 864 F. Supp. 1274, 1280 (N.D. Ga. 1994) (rejecting the same argument under similar circumstances).

v. *Florida Board of Regents*,<sup>14</sup> where the Court held that no exhaustion requirement applies to section 1983 actions.<sup>15</sup> Yet, in the *Hamilton Bank* case, the Court expressly distinguished *Patsy* and held that as applied takings claims differ from other constitutional claims.<sup>16</sup> Courts do not require an exhaustion of administrative remedies, but courts do require a final decision of the initial decisionmaker.

Some of these premature litigation efforts are understandable in light of the uncertainty regarding the finality of a decision for the purposes of prong one and the difficulty in distinguishing finality from exhaustion. Property owners may encounter difficulty ascertaining the number of applications for development, to whom the applications must be submitted, and the need to apply for development permission when to do so seems futile. Clarity is needed in the prong one final decision rule.

Confusion also exists regarding prong two, the compensation requirement.<sup>17</sup> Despite the fact that the Constitution mandates a compensation remedy,<sup>18</sup> some litigants and courts question the availability of such claims in state courts. The lack of recognition of the res judicata implications of prong two complicates the claim.<sup>19</sup> In this respect, the ripeness label applied to prong two is misleading for it suggests that a claim may be heard in federal court after a state court denies compensation. This is generally not true. Once tried in state court, the claim cannot be relitigated in federal court. Characterizing prong two as a forum restricting rule, rather than a ripeness rule, provides more accuracy and safety.<sup>20</sup>

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14. 457 U.S. 496 (1982).

15. *Id.*

16. *Celentano*, 815 F. Supp. at 567.

17. See *infra* part IV.D.

18. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987). Confusion emerges over whether the claim pursued in state court is one of state or federal law. See *infra* part IV.C. See also *Dodd v. Hood River County*, 59 F.3d 852, 860 (9th Cir. 1995) (taking the position, contrary to that advocated in this article, that the issue is one of state law).

19. See *infra* part IV.D.

20. See *infra* part IV.C. For a detailed discussion of the res judicata issue, see Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. LAW. 479, 482 (1992) [hereinafter Roberts, *Fifth Amendment*].

The prong two requirement to seek compensation from state courts is sometimes referred to as an exhaustion of state remedies requirement. See *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). This is in contrast to the question of exhausting administrative remedies, which is not required to meet the final decision prong of *Hamilton Bank*.

This article's focus on choice of forum is limited to *Hamilton Bank's* prong two. As to other issues such as abstention, see Kenneth B. Bley, *Deciding Whether to Sue in Federal Court*, URB. LAND Feb. 1995, at 39; Thomas E. Roberts, *Forum Selection in Land-Use Cases: Is Federal Court a Viable Option?* 16 URB. ST. & LOC. L. NEWSL. 1 (1993) [hereinafter Roberts, *Forum Selection*].

## II. THE LEADING CASES

In *Hamilton Bank*, the developer received preliminary plat approval in 1973 for a cluster home development from the Williamson County Regional Planning Commission.<sup>21</sup> The developer then conveyed open space easements to the county and began putting in roads and utility lines.<sup>22</sup> Over the next few years, the commission reapproved the preliminary plans on several occasions.<sup>23</sup> In 1977, the county changed the density provisions of its zoning ordinance.<sup>24</sup> In 1978, the commission again approved the plans using the prior ordinance. In 1979, the commission reversed itself and advised the developer that the project was subject to the 1977 ordinance.<sup>25</sup> When a revised plat was submitted in 1980, the commission rejected it.<sup>26</sup> The developer then went to the County Board of Zoning Appeals and sought an interpretation of the applicable law.<sup>27</sup> The Board determined that the 1973 ordinance should apply.<sup>28</sup> In 1981, the developer resubmitted two plats.<sup>29</sup> The commission refused to follow the decision of the Board of Zoning Appeals and rejected the plans for eight reasons.<sup>30</sup> The commission based its reasons for rejecting the plans on both new and old laws.<sup>31</sup> The developer then brought suit in federal court.<sup>32</sup>

The United States Supreme Court found that the action was not ripe.<sup>33</sup> The Court noted that a takings claim is premature "until the government entity charged with implementing the regulations has reached a final decision."<sup>34</sup> The Court held that there was no final decision since the developer had not sought "variances that would have allowed it to develop the property according to its proposed plat . . . ." <sup>35</sup> The developer contended "that it [had done] everything

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21. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 177 (1985).

22. *Id.* at 178.

23. *Id.*

24. *Id.*

25. *Id.* at 178-79.

26. *Id.* at 179.

27. *Id.* at 180.

28. *Id.* at 181.

29. *Id.*

30. *Id.* (two of the reasons were density and grade problems which were cited in the earlier denial).

31. *Id.* at 181-82.

32. *Id.* at 182.

33. *Id.* at 187.

34. *Id.* at 186.

35. *Id.* at 188.

possible to resolve the conflict with the commission.’<sup>36</sup> The Court was not convinced that a final decision had been obtained.<sup>37</sup> The Board of Zoning Appeals had the authority to grant variances dealing with five of the county’s eight objections.<sup>38</sup> Moreover, the Commission itself had the power to grant variances to solve the other objections.<sup>39</sup>

The developer’s failure to use the inverse condemnation process available in state court caused the second problem. Even assuming that the restrictions constituted a taking because of their severity, no constitutional violations occurred since no compensation had been denied.<sup>40</sup> The wrong forum had been chosen.<sup>41</sup>

In 1986, one year after *Hamilton Bank*, the Court decided *MacDonald, Sommer & Frates v. County of Yolo*.<sup>42</sup> In *MacDonald*, the developer submitted a preliminary plan to subdivide residentially zoned land into 159 lots for single family and multi-family housing.<sup>43</sup> The planning commission rejected the plan due to inadequate public street access, and deficiencies in police protection and water and sewer services.<sup>44</sup> The developer then filed suit in the state court alleging that its property was being condemned to open space and agricultural use.<sup>45</sup>

The Supreme Court affirmed the state court’s holding that the action was unripe since the developer had not obtained a final decision from the authorities as to what kind of development could be allowed.<sup>46</sup> The developer failed to convince the Court that it had, with its one application, done enough.<sup>47</sup> The Court noted that “unfair procedures”<sup>48</sup> need not be pursued by a developer, but the “[r]ejection of exceedingly grandiose development plans [would] not logically imply that less ambitious plans [would] receive similarly unfavorable reviews.”<sup>49</sup> The Court clearly indicated that the effort required from a developer was not useless or futile.<sup>50</sup> Rather, the Court observed that

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36. *Id.*

37. *Id.* at 187.

38. *Id.* at 188.

39. *Id.* at 188-89.

40. *Id.* at 195.

41. *Id.* at 196-97.

42. 477 U.S. 340 (1986).

43. *Id.*

44. *Id.* at 342-43.

45. *Id.* at 343.

46. *Id.* at 349.

47. *Id.* at 351.

48. *Id.* at 350 n.7.

49. *Id.* at 353 n.9.

50. *Id.* at 353 n.8.

the plaintiff had “‘applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan [could not] be equated with a refusal to permit any development . . . . Land use planning [was] not an all-or-nothing proposition.’”<sup>51</sup>

To summarize, *Hamilton Bank* and *MacDonald* require that, prior to filing suit in federal court, developers obtain from state courts a final decision on a meaningful application for development.<sup>52</sup> If a variance procedure exists that might permit a project to proceed, it must be used unless application would be futile. If development permission is denied, compensation must be sought by way of an inverse condemnation action in state court. For a property owner’s lawyer, this approach is “easier said than done.”

### III. THE FINAL DECISION REQUIREMENT

This section addresses the questions raised by the final decision requirement. Does the final decision requirement only pertain to as applied regulatory takings claims (such as those involved in *Hamilton Bank* and *MacDonald*) or to physical and facial regulatory claims as well? Does it apply to exaction cases like *Dolan v. City of Tigard*?<sup>53</sup> What is the distinction between exhaustion and finality in the context of zoning decisions? When is reapplication required? When is a variance request required? What is needed to show futility?

#### A. *The Final Decision Rule is Inapplicable to Physical Takings and Facial Regulatory Takings*

*Hamilton Bank*’s final decision rule stems from the nature of an as applied regulatory challenge. An as applied regulatory challenge involves an ad hoc, fact-based examination of a regulation’s economic impact and its interference with reasonable investment-backed expectations.<sup>54</sup> To determine whether economic viability has been diminished from a piece of property by enactment of a regulation, a court must determine how much development will be permitted. By contrast, a landowner bringing a physical takings claim is not subject

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51. *Id.* at 347.

52. While *Hamilton Bank* and *MacDonald* are the leading ripeness cases, the Court had, in several prior opinions, expressed concern over the lack of clarity regarding the actual impact of a regulation in finding no taking to have occurred on the merits. In hindsight, these opinions have come to be treated as ripeness cases as well. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

53. 114 S. Ct. 2309 (1994).

54. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

to this requirement since the physical invasion itself establishes what has been taken.<sup>55</sup>

Likewise, a property owner whose takings claim makes a facial challenge to a statute or regulation is not subject to the final decision rule. By definition, the mere enactment of the law, and not its application, takes the property.<sup>56</sup>

### B. Ripeness in Exaction Challenges

Questions arise as to whether the final decision rule of *Hamilton Bank* applies with the same force to exaction challenges<sup>57</sup> as it does to economic impact cases.<sup>58</sup> The Oregon Court of Appeals recently debated the issue in *Nelson v. City of Lake Oswego*.<sup>59</sup> In *Nelson*, the property owners sought a permit to construct a house.<sup>60</sup> The city manager required the property owners to convey a fifty-five foot drainage easement to the city as a condition for the permit.<sup>61</sup> The property owners did not appeal the city manager's decision to the city council as was allowed under the code.<sup>62</sup> Instead, the property owners conveyed the easement to the city and sued for compensation.<sup>63</sup>

In response to the city's argument that the suit was unripe for failure to obtain a final decision, the court held that the first prong of *Hamilton Bank* did not apply to exaction cases.<sup>64</sup> According to the court, the purpose of the final decision rule was related solely to the "too far" question of economic impact takings cases.<sup>65</sup> A court needs to know, it reasoned, "whether the owner has applied for enough uses or decisions so that the scope of what the local regulations permit or prohibit can be known."<sup>66</sup> Here, the court knew the effect of the

55. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990). But see *Harris v. City of Wichita*, 862 F. Supp. 287, 291 (D. Kan. 1994) (stating, in dicta, that the law is unclear).

56. See *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992); *Galbraith v. Planning Dep't*, 627 N.E.2d 850, 853-54 (Ind. Ct. App. 1994).

57. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

58. Though some question exists as to the final decision rule of *Hamilton Bank* in exaction cases, no one has specifically questioned the applicability of *Hamilton Bank*'s second prong, the compensation requirement. Some concern might exist, however, due to Justice Stevens' dissenting comments in *Dolan*. See *infra* text accompanying notes 168-80.

59. 869 P.2d 350 (Or. Ct. App. 1994).

60. *Id.* at 351.

61. *Id.*

62. *Id.*

63. *Id.* at 351.

64. *Id.* at 352-53.

65. *Id.* at 353.

66. *Id.* at 352.

condition since the condition had “resulted in the actual acquisition of a private property interest.”<sup>67</sup>

Judge Landau, in his concurring opinion, disagreed with the majority in *Nelson*.<sup>68</sup> Judge Landau found no distinction between the two types of regulatory taking cases for purposes of the final decision rule.<sup>69</sup> Reading Supreme Court precedent<sup>70</sup> to require that an applicant seek a variance or waiver from the initial decisionmaker (whom he regarded as the city council, not the city manager), Judge Landau thought the city council should have had the opportunity to exercise the power it had reserved in its ordinances to review and reverse the city manager’s decision.<sup>71</sup>

The Supreme Court did not address the ripeness issue in *Dolan* since the property owner complied with the final decision rule. However, the policy considerations that underlie the ripeness rules favor the concurrence’s approach in *Nelson*. The Supreme Court has insisted that litigants make some effort to give local governments a chance to finalize the application of ordinances to specific land development requests.<sup>72</sup> Pursuit of a final decision gives state and local governments a chance to reevaluate their positions.<sup>73</sup> Only in *Lucas*, where state law did not allow the agency to modify the regulation, did the Court treat an as applied takings claim as ripe without some deliberation between the authorities and the developer.<sup>74</sup>

Since the property owner in *Nelson* conveyed the easement first, and then sued the city, in effect, a physical taking occurred. As noted above, the final decision rule exempts takings claims involving physical invasions. A difference exists, however, between physical takings that result from unilateral government conduct and physical takings that result from regulations. When the physical takings claim stems from the landowner’s land being flooded by a dam project or suffering overflights from noisy planes, the landowner and the government have no advance opportunity to consult with each other.<sup>75</sup> The invasion occurs, and nothing exists to negotiate. In the

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67. *Id.* at 350.

68. *Id.* at 355 (Landau, J., concurring).

69. *Id.*

70. *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 294 -95 (1981).

71. *Nelson*, 869 P.2d at 357 (Landau, J., concurring).

72. *See, e.g., MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350 (1986); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

73. *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 525 (Fla. 4th DCA 1994).

74. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

75. *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) (flooding takings case); *United States v. Causby*, 382 U.S. 256 (1946) (overflight case).

exaction case, however, the property owner initially approaches the city requesting development permission, and the parties debate the propriety of an exaction. If the purpose behind the ripeness rule is, in part, to give the government “an opportunity . . . to change its mind,”<sup>76</sup> as one court put it, then the property owner ought to make some effort to see that the government has the chance to do so.

The same rationale ought to apply to monetary exactions, or impact fees, whether challenged on Fifth Amendment takings grounds or Fourteenth Amendment due process grounds.<sup>77</sup> The argument requiring a property owner to seek a final decision against the levy of a fee is in fact stronger than in the case of a physical exaction, since the resemblance to a physical taking is lacking.<sup>78</sup>

In sum, prudence suggests that a property owner obtain a final decision and seek a variance from a condition or impact fee imposed in the permit seeking process prior to seeking compensation. This effort will likely shield a property owner from wasting time, effort, and resources by pursuing a lawsuit that a court might declare unripe.

Putting aside the issue of finality in the exaction context, the question remains of how a property owner proceeds when confronted by a municipal demand for land or money in return for a permit. A property owner can do what the *Nelson* plaintiffs did—convey the land or pay the fee to the government and then sue.<sup>79</sup> While this approach worked in *Nelson*, in some states the property owner who follows this approach risks a finding of waiver and may lose the right to challenge the exaction.<sup>80</sup>

By contrast, a property owner may attempt to use the approach found in *Dolan*—refuse to convey the land and challenge the city’s decision that a permit will be granted only if certain land is dedicated.<sup>81</sup> This approach avoids the waiver problem. However, according to Justice Stevens’ dissent in *Dolan*, this approach makes the takings claim unripe.<sup>82</sup> Specifically, Justice Stevens stated that “Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her

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76. *Tinnerman*, 641 So. 2d at 525.

77. Conceptually, an impact fee fits more appropriately as an arbitrary and capricious substantive due process claim than as a Fifth Amendment taking claim.

78. See *Nelson v. City of Lake Oswego*, 869 P.2d 350 (Or. Ct. App. 1994) (premising non-application of the final decision rule on the similarity between exactions and physical takings).

79. *Id.* at 351.

80. See *infra* note 85.

81. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

82. *Id.* at 2322 (Stevens, J., dissenting).

constitutional right to compensation."<sup>83</sup> Acceptance of Justice Stevens' rationale puts a potential inverse condemnation claimant with an exaction challenge in an untenable position. The city may never take the step suggested by Justice Stevens in his opening sentence above; for example, there may be no direct condemnation. Likewise, the city will not grant the permit without the dedication. This leaves the property owner with three choices.

First, the property owner may drop the development proposal. This results in a denial of a presumably legitimate proposed use. Second, the property owner may deliver a deed to the city under protest and obtain the permit. An advantage to the second approach is that the developer, by proceeding with the project, mitigates damages. This approach is unsatisfactory, however, unless it can be reversed by a judicial challenge voiding the dedication condition or ordering the payment of compensation. This would presumably be acceptable to Justice Stevens, but, unless state law permits payment under protest,<sup>84</sup> the property owner's claim might be waived.<sup>85</sup> Perhaps the Supreme Court would invalidate a state rule that imposed waiver on one who deeded land or paid a fee under duress of an unconstitutional requirement.

Finally, without complying with the condition, the property owner could file suit seeking a declaration that the condition is unrelated to the proposed development and ask the court to void the condition, or request that the court order the payment of compensation if the city refuses to drop its demand. No risk of waiver arises, but this

83. *Id.* at 2328 (Stevens, J., dissenting). See also *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11-17 (1990) (finding a takings claim premature because the property owner had not yet sought compensation under the Tucker Act); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981) (finding no taking where no one "identified any property . . . that has allegedly been taken").

84. See *Balch Enters. v. New Haven Unified Sch. Dist.*, 268 Cal. Rptr. 543 (Ct. App. 1990) (suit challenging school fee paid under protest subject to four year statute of limitations).

85. See, e.g., *Trimen Dev. Co. v. King County*, 829 P.2d 226 (Wash. Ct. App. 1992) (finding that a developer who had paid a park fee and proceeded with development was estopped from challenging legality of ordinance), *aff'd on other grounds*, 877 P.2d 187 (Wash. 1994). But see *Henderson Homes, Inc. v. City of Bothell*, 877 P.2d 176 (Wash. 1994) (finding that where park impact fee was characterized as a tax, suit to recover payment was allowed and the use of estoppel by the city was to be rejected in light of the city's lack of clean hands).

See also *Board of Supervisors v. Laurelwood Constr. Co.*, 600 A.2d 690, 694 (Pa. Commw. Ct. 1991) (holding that state law required developer to appeal condition to zoning board of adjustment or township's legislative body rather than pay fee and seek judicial review); *Jesse v. Box Butte County Bd. of Equalization*, 374 N.W.2d 235 (Neb. 1985). But see *Nelson v. City of Lake Oswego*, 869 P.2d 350 (Or. Ct. App. 1994) (deciding a case on merits where property owners conveyed easement and then sued, but finding no taking).

approach may delay the property owner's project.<sup>86</sup> The plaintiffs in both *Nollan* and *Dolan* followed this path.<sup>87</sup>

Justice Stevens' suggestion in *Dolan*, which mandates the second option and risks waiver, should be rejected as both unnecessary to meet ripeness concerns and unfair to the property owner. As long as the property owner obtains a final decision either through pursuing the second option (with payment under protest) or the third option (a challenge without compliance), the property owner alerts the local governing body to the risk that the local governing body may have to pay compensation. Furthermore, the local governing body can, if it wishes, decide whether to continue insistence on the exaction condition.

### C. Exhaustion, No; Finality, Yes.

Confusion exists between the finality requirement and the exhaustion requirement.<sup>88</sup> As Justice Blackmun explained in *Hamilton Bank*:

The question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.<sup>89</sup>

Michael Berger differentiates the two by labeling the exhaustion requirement "vertical finality" and the finality requirement "lateral finality."<sup>90</sup> Accordingly, the property owner incurs no obligation to

86. Any delay might be compensable under *First English* as a temporary taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

87. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2311 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 825 (1987).

88. Confusion exists since some courts refer to *Hamilton Bank's* prong two requirement (to seek compensation from the state courts) as an "exhaustion of state judicial remedies" requirement. See, e.g., *Jama Constr. v. City of Los Angeles*, 938 F.2d 1045 (9th Cir. 1991).

89. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-93 (1985) (citations omitted). Despite this distinction, Shonkwiler and Morgan observe that many state courts mistakenly use the phrase "exhaustion of administrative remedies" to include the requirement that government action be final. JOHN W. SHONKWILER & TERRY D. MORGAN, *LAND USE LITIGATION* 281 (1986).

90. Michael M. Berger, *The Ripeness Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN, 1, 7-15. (Matthew Bender ed., 1991).

climb the administrative ladder to seek review of local land use decisions, but a property owner must seek some confirmation from the initial decisionmaker that a permit denial is final.

While these characterizations are useful starting points, they must be used cautiously. The specific context of local procedure coupled with the purpose of local land use rules drives the course of action a property owner must take. Resort to a board of adjustment, for example, is not required if the board has only the power to review the application of a regulation (vertical finality). However, appeal to a board of adjustment is required if the board possesses the power to waive or grant a variance from the regulations (lateral finality). *Hamilton Bank* provides an example. The Court in *Hamilton Bank* stated that the developer would not be required to appeal the planning commission's rejection of the developer's plat application to the board of adjustment since the board had the power only to review, and not to participate, in the approval decision.<sup>91</sup> However, the Court instructed that the property owner did have to go to both the board of adjustment and the planning commission to seek variances because those bodies had the power to relieve the property owner of the alleged hardships through a variance.<sup>92</sup>

Hedging is necessary, however, because the case law is muddled. The Third Circuit held, for example, that repeated denials of a building permit by a building inspector do not constitute final action where appeal of the inspector's decisions to a board of adjustment is available.<sup>93</sup> The Third Circuit based its ruling on its determination that the board of adjustment, not the inspector, had the final authority to construe the zoning regulations.<sup>94</sup> Furthermore, a property owner need not appeal the legality on state law grounds of a land use board's action to a state court for a final decision.<sup>95</sup>

Identifying the initial decisionmaker is a major obstacle in determining a final decisionmaker. The "government entity," or the "initial decisionmaker," may include the local legislative body, the

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91. 473 U.S. at 193.

92. *Id.* at 188-90.

93. *Acierno v. Mitchell*, 6 F.3d 970, 977 (3d Cir. 1993).

94. *Id.* The court noted that the board had plenary review over "any order, requirement, decision, or determination" under the zoning ordinance by any county officer, and "authority to hear and decide any 'applications for interpretation of any zoning ordinance, code, regulation, or map upon which [it] is empowered to pass.'" *Id.*

95. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985); *Acierno*, 6 F.3d at 977 n.17. Nevertheless, property owners have an obligation to go to state court for an inverse condemnation claim. *Hamilton Bank*, 473 U.S. at 194. While in state court, the property owner seeks a declaration that a taking occurred and an award of compensation. *Id.* at 194-95.

planning commission, the building inspector, and the board of adjustment. As the opinion in *Hamilton Bank* demonstrates, it is a mistake to view the term “initial decisionmaker” narrowly.<sup>96</sup> The plural term “decisionmakers,” rather than the singular, more accurately expresses the requirement. Depending on local procedure, resort to all four (the legislative body, the planning commission, the building inspector, and the board of adjustment) may be required to make a decision final. A request to the legislative body for rezoning may be necessary in addition to seeking a variance, especially where a current zoning classification is somewhat dated.<sup>97</sup>

Courts are generally anxious to give the governing body a “realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property.”<sup>98</sup> With this in mind, courts may broadly construe the term “local decisionmaker” to carry out that purpose. If a property owner wishes to minimize the chance of a dismissal on ripeness grounds, prudence dictates resorting to all of the various local agencies, whether they carry administrative or legislative labels.

*D. Application and Reapplication: Meaningful, Grandiose, or Meager?*

The *MacDonald* Court’s statement that the “[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews”<sup>99</sup> has led to the requirement that a developer must submit at least one meaningful proposal. The property owner may incur difficulty in deciding when and how often reapplication is necessary.

In *MacDonald*, the Court said that “a court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.”<sup>100</sup> This phrase oversimplifies the problem and unduly burdens the property owner’s quest to ascertain what the city will allow. The land development permitting process typically does not involve the developer merely going to the city and asking, “What will you let me do?” That might occur in a classical, simple, and

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96. The Court in *Hamilton Bank* required resort to both the planning commission and the board of adjustment. 473 U.S. at 188.

97. See *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. Unit A May 1981), cert. denied, 455 U.S. 907 (1982). By contrast, where an application for development permission is denied and the land then is immediately downzoned, a request for rezoning is not required since the recent nature of the downzoning shows it would be futile. *Hoehne v. County of San Benito*, 870 F.2d 529, 535 (9th Cir. 1989). See also *infra* notes 132-43 and accompanying text.

98. *Hernandez*, 643 F.2d at 1200.

99. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 353 n.9 (1986).

100. *Id.* at 348.

mythical Euclidean zoning scheme, where the city would respond by allowing commercial use on the lot and that would be the end of the matter. Under most land use schemes, however, a parcel's current zoning classification is only the beginning. More often, the developer must pursue subdivision approval or employ a flexible zoning tool (a conditional use permit, floating zone, or site review). These processes require the developer to submit a proposal to the city. If the answer is "yes," the developer faces no problem and the development proceeds.

If the answer is "no" or "maybe," the developer must decide whether its proposal was meaningful or grandiose. If the developer thinks that the proposal might have been grandiose, the developer must reapply. This determination will not be easy to make. If the record shows that the city might be receptive to a modified proposal, the developer will need to reapply. This occurred in both *MacDonald* and *Penn Central Transportation Co. v. City of New York*.<sup>101</sup> More recently, the Second Circuit found a claim unripe where the commission had denied permission after determining that the location of the structures on the land in question would interfere with a deer habitat.<sup>102</sup> After review, the commission indicated "that it would be receptive to a subdivision proposal that placed lots in a different segment" of the parcel.<sup>103</sup> The commission also determined that the developer "had not undertaken all feasible and reasonable means of reducing the development's effect on the deeryard."<sup>104</sup> Based on these facts, the court held that the developer needed to reapply and alter its development request in order to determine what the commission would allow.<sup>105</sup> Since some development seemed likely to be permitted, the developer had to ask for permission to develop.

The Supreme Court has given some examples of grandiose and meaningful applications, though these examples are not especially helpful. The proposal rejected by the county in *MacDonald* was

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101. *MacDonald*, 477 U.S. at 352-53; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

102. *Southview Assocs. v. Bongartz*, 980 F.2d 84, 90-92, 99 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993). Reapplication to the initial decisionmakers is required as opposed to appeal of the initial denial. In *Southview*, the developer filed an application for development permission with the district environmental commission. When the commission denied the permit, the developer appealed to the state environmental board. After losing that round, the developer appealed to the state supreme court. Again, the developer lost. The court affirmed the permit denials. The developer then sued in federal court arguing that the developer had obtained a final decision rendering the claim ripe. The court held that the developer must reapply to the commission. *Id.*

103. *Id.* at 99.

104. *Id.*

105. *Id.* at 98.

referred to as an “intense type of residential development.”<sup>106</sup> The *MacDonald* Court also intimated that the “five Victorian mansions”<sup>107</sup> sought in *Agins v. City of Tiburon*<sup>108</sup> and the nuclear power plant in *San Diego Gas & Electric Co. v. City of San Diego*<sup>109</sup> were of the grandiose variety.<sup>110</sup> The proposed fifty-five story office tower atop the landmark Grand Central Station in the *Penn Central* case was also likely “grandiose.”<sup>111</sup>

Circumstances dictate when and how often reapplication must be made. Take, for example, *Gil v. Inland Wetlands & Watercourses Agency*.<sup>112</sup> The court in *Gil* found a lack of finality even though the developer submitted four applications:

Our review of the record, however, convinces us that the plaintiff has not met his burden of demonstrating finality. A number of factors lead us to this conclusion. First, although we agree with the Appellate Court that the plaintiff had a reasonable expectation of developing the property for residential purposes, the wetlands status of a portion of the property should also have warned the plaintiff that development would be difficult and that repeated applications might be necessary before the agency would approve an application for a building permit. In this case, although the plaintiff submitted four applications, only three were actually reviewed on their merits.

Additionally, the record discloses that whereas neighboring homes on similarly sized lots varied in footprint size from 800 to 900 square feet, each of the plaintiff’s applications proposed single family houses with footprints exceeding 1500 square feet. Furthermore, although the plaintiff’s final application reduced the footprint of the proposed house to 1800 square feet from the 2100 square feet of the preceding application, the final application nonetheless represented an increase from an earlier application’s 1500 square feet proposed residence. In light of these factors, we cannot say that the agency would have rejected a more modest proposal if one had been offered by the plaintiff.<sup>113</sup>

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106. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 n.8 (1986).

107. Although the *MacDonald* court elaborately characterized the residential developments at issue in *Agins* as “Victorian mansions,” the Court in *Agins* simply referred to the residential developments as “property.” *Agins v. City of Tiburon*, 447 U.S. 255, 257 (1980).

108. 447 U.S. 255 (1980).

109. 450 U.S. 621 (1981).

110. *MacDonald*, 477 U.S. at 353 n.9.

111. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

112. 593 A.2d 1368 (Conn. 1991).

113. *Id.* at 1374-75.

*Gil*, of course, is an easy case since the submissions increased the size of the initially rejected proposal. A more typical response to the denial of the 1500 square feet proposal would have been to reduce the size of the proposal, but by how much? Should the builder necessarily be bound by the 800 square feet of existing homes that perhaps were built to meet the needs of a different market? No easy answer to this question exists.

In addition to the guesswork of whether to reapply, the developer must evaluate the potential for waiver. The developer trying to make a case ripe by making meaningful, non-grandiose submissions may ask for less than the developer wants. If the city says “no” to one or two “greedy” requests, and says “yes” to a third, more moderate request, the developer can proceed to build according to the approved plans. But does the developer have the right to sue for the losses sustained as a result of the prior denials? Since the city has approved the meager request, has not the developer waived the right to challenge the prior denials of the “greedy” requests?

If waiver poses a realistic risk, the developer should not make a meager request nor be required to do so. The property owner in *Dolan* did not do so in her case.<sup>114</sup> She simply sought a variance to proceed with her initial plan, which was denied.<sup>115</sup> Presumably, since the issue was not discussed, her request was meaningful and not grandiose. Only when the request is grandiose is the developer required to accommodate by asking for less.

Although the developer may always have to engage in some guesswork, the meaningful proposal rule ought not force the developer to make repeated, increasingly meager requests in order to make a claim ripe. Recall that *MacDonald* is the source of the meaningful application rule. In *MacDonald*, the Court spoke disapprovingly only of “relatively intense” and “grandiose” proposals.<sup>116</sup> The case need not be read as requiring repeated submissions. On one level, a developer may be required to submit a request or requests and make some concessions. However, reading the meaningful application rule to make a local government’s decision unreviewable because a developer is unwilling to significantly reduce a project to meet what that developer considers unreasonable demands is an overly broad application of the rule.

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114. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

115. *Id.* at 2314. The Court did not discuss ripeness. The Court did note that when Dolan sought a variance after the initial imposition of the exactions, she did not offer to downsize her project in order to mitigate the harm to the city. She simply argued that her project was consistent with the city’s plan. *Id.* Implicitly, that was enough to meet prong one.

116. See *supra* text accompanying notes 42-51 and 99-111.

The grandiose concern should be used sparingly to strike claims on the grounds of ripeness. Though *MacDonald* envisions some reap-plication process, compelling the developer to repeatedly downsize its project is inconsistent with the variance requirement of *Hamilton Bank*. In *Hamilton Bank*, the Court used the developer's proposal as the frame of reference.<sup>117</sup> The Court only required the developer to seek variances "that would have allowed it to develop the property according to its proposed plat."<sup>118</sup> Even in a case like *Gil*,<sup>119</sup> a proposal that is significantly larger or more intense than existing uses in the surrounding area may be reasonable. The current zoning may be excessive and the surrounding property may be underused.

Favoring the property owner by relaxing and clarifying the final decision rule does not impose unreasonable burdens on the government. It simply gives the property owner his or her "day in court." More favorable rulings on final decision ripeness will not necessarily overwhelm municipal treasuries with huge judgments, since the substantive rules of takings law make it clear that property owners who seek to maximize the development potential of their land run a very real risk of losing on the merits. Thus, the substantive rules of takings law ought to deter hasty filings. More favorable rulings, however, will occupy more of the courts' time in hearing cases that allege government overreaching. However, government overreaching ought not be immune from being tested in court. Protection of constitutional rights justifies the added judicial expense.

### E. Prong One Futility

The *MacDonald* Court suggested that futile or useless applications are not necessary.<sup>120</sup> But what does it take to convince the Court?<sup>121</sup> *Lucas* demonstrates that a property owner need not pursue applications for relief that the authorities lack the power to give.<sup>122</sup> However, the likelihood of success is not the test. Relief must be pursued if it is theoretically possible that it can be granted.<sup>123</sup>

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117. 473 U.S. at 188.

118. *Id.*

119. *Gil v. Inland Wetlands & Watercourses Agency*, 593 A.2d 1368, 1374-75 (Conn. 1991).

120. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 353 n.8. See also Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 48 (1992) ("In Justice White's view, the 'ripeness' requirements of both *Williamson County* and *MacDonald* could be satisfied upon a showing of futility."); Overstreet, *supra* note 8, at 113.

121. Futility is a question of law for the court. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232-33 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 193 (1994).

122. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

123. *Id.* at 2891; *Hamilton Bank*, 473 U.S. at 188.

Suspicious as to local hostility or even oral statements by local officials generally cannot be relied upon to release the property owner from the obligation of making a formal application. In *Wheeler v. City of Wayzata*,<sup>124</sup> the property owners wished to construct docks on waterfront land as part of a commercial marina, but were prevented from doing so because the land was zoned for single-family use.<sup>125</sup> Since the physical characteristics of the land precluded residential structures, the property owners were left with no use of their land.<sup>126</sup> Without seeking a variance, special use permit, or rezoning, the property owners brought a takings claim.<sup>127</sup> In response to a challenge that the claim was not ripe under *Hamilton Bank*, the property owners said it would have been futile to seek relief from the city because a few years earlier the city manager told the owners that "the city 'does not want any development of that property.'"<sup>128</sup> The court rejected the futility argument, noting that the burden is on the challenger to prove futility.<sup>129</sup> An oral statement made years earlier by one authorized to grant or deny land use permission does not suffice to reflect the town's current position on development.<sup>130</sup>

While the absence of a variance or other similar procedure may render the claim ripe as to prong one on futility grounds,<sup>131</sup> such an absence, standing alone, is not proof of futility. Even where no variance procedure exists, instances arise where a rezoning must be sought. This is particularly true where the currently contested zoning classification is a dated one.<sup>132</sup> In *Celentano v. City of West Haven*,<sup>133</sup> for example, land was zoned for open space in 1967 under the mistaken assumption that it was publicly owned.<sup>134</sup> The court dismissed the property owner's 1990 suit on ripeness grounds since he

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124. 511 N.W.2d 39 (Minn. Ct. App. 1994), *rev'd on other grounds*, 533 N.W.2d 405 (Minn. 1995). See also *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

125. *Wheeler*, 511 N.W.2d at 41.

126. *Id.* at 42.

127. *Id.*

128. *Id.* at 43.

129. *Id.*

130. Recent rejections of claims of futility include a case where the property owner alleged that city officials were predisposed to voting against any request he might make. *Celentano v. City of W. Haven*, 815 F. Supp. 561 (D. Conn. 1993). Reliance on private or off-the-record comments was found to be insufficient to establish that formal application would be futile. *Id.*

131. See *Lucas*, 112 S. Ct. at 2890-91; *Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068, 1072 (M.D.N.C. 1992).

132. See generally *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. Unit A May 1981) (stating that a municipality must be given a "realistic opportunity" to review its zoning legislation and correct the inequity), *cert. denied*, 455 U.S. 907 (1982).

133. 815 F. Supp. 561 (D. Conn. 1993).

134. *Id.* at 563-64.

had failed to formally apply for a rezoning.<sup>135</sup> The court refused to “permit a disgruntled landowner to by-pass or preempt the local agency charged with adjudicating the validity of zoning designations in favor of a federal district court.”<sup>136</sup> Thus, the city gets a chance to make a current determination as to how the land is to be used before the city is hauled into court.

If the legislation is recent it is less likely that the legislative body will change its mind. In such case the developer need not seek a rezoning or variance. A recent downzoning itself may be evidence of finality. In *Resolution Trust Corp. v. Town of Highland Beach*,<sup>137</sup> the town granted permission in 1980 for a planned unit development to be constructed by 1990.<sup>138</sup> In 1984, a new town board decided to shorten the completion date to 1985.<sup>139</sup> The developer did not meet the new deadline. In 1987 the town downzoned the land to eight units per acre, and the developer sued.<sup>140</sup> In 1990, the town downzoned the land to six units per acre.<sup>141</sup> The town argued that the developer should have appealed or sought an extension of time from the 1984 decision, but the court found that the later downzonings evidenced a final decision.<sup>142</sup>

Some courts are more stringent. In *Southern Pacific Transportation Co. v. City of Los Angeles*,<sup>143</sup> a strip of railroad land was zoned in varying classifications consistent with the zoning of adjacent land along the railroad route.<sup>144</sup> When the railroad applied to the Interstate Commerce Commission for abandonment, the city downzoned the land to a classification allowing only parking lots.<sup>145</sup> The railroad brought a takings claim without first applying for development permission.<sup>146</sup> The court held the claim unripe.<sup>147</sup>

When the local government imposes a moratorium on development, a claim may be ripe under the futility exception.<sup>148</sup> Where a city

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135. *Id.* at 567. Celentano acquired the land in 1974. He filed, then voluntarily withdrew, a site development plan in 1986. In 1987, Celentano and the city engaged in informal discussions regarding development of the property. *Id.* at 563-64.

136. *Id.* at 568.

137. 18 F.3d 1536 (11th Cir. 1994).

138. *Id.* at 1540.

139. *Id.* at 1542.

140. *Id.* at 1542-43.

141. *Id.* at 1546-47.

142. *Id.* at 1547.

143. 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991).

144. *Id.* at 500.

145. *Id.* at 501.

146. *Id.*

147. *Id.* at 504.

148. See *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1324 (D. Nev. 1992) (finding prong one was met where all permit applications were frozen). One court seems

freezes development pending the resolution of a particular problem (for example, adopting a plan to deal with flooding problems) or to give the city time to study community needs,<sup>149</sup> courts have held it to be futile to apply for relief.<sup>150</sup> Of course, if the interim ordinance itself contains a variance procedure or allows some uses, a landowner is obligated to pursue those processes to obtain a final decision.

#### IV. SEEKING COMPENSATION FROM STATE COURTS

The second prong of *Hamilton Bank* requires takings claimants to seek compensation from the state courts.<sup>151</sup> While *Hamilton Bank*, decided in 1985, made the second step contingent on whether the state provided a procedure for awarding compensation for regulatory takings,<sup>152</sup> that contingency was removed in 1987. In 1987, the Court held in *First English Evangelical Lutheran Church v. County of Los Angeles*<sup>153</sup> that the self-executing nature of the Fifth Amendment required a compensation remedy.<sup>154</sup> Under the Supremacy Clause,

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to think that the ripeness rules of *Hamilton Bank* do not apply to temporary takings claims. *Alexander v. Town of Jupiter*, 640 So. 2d 79 (Fla. 4th DCA 1994). The court in *Alexander* noted that the United States Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), did not discuss ripeness. *Id.* From that, the court in *Alexander* concluded that ripeness is not a component of a temporary takings claim, only a permanent claim. *Id.* at 81-82. Several problems arise with this conclusion. First, the *First English* "temporary taking" label is a remedy issue only. It simply describes the option the state has of limiting its damages by lifting the ordinance that the court finds to be excessive. Second, *First English* did not need to address the ripeness of the takings claim because it assumed, for the purposes of argument, that a taking had occurred and dealt solely with the remedy issue. 482 U.S. at 311. Third, the *First English* Court noted that the church had complied with prong two of *Hamilton Bank*, which it assumed applied. *Id.* at 314. Finally, had the final decision been discussed, the futility doctrine would have applied. The moratorium challenged in *First English* flatly prohibited any use of the property while studies were undertaken to determine what uses eventually should be allowed in light of flooding dangers. *Id.* at 307. It would have been pointless for the church to seek a development permit.

149. See Thomas E. Roberts, *Interim Development Controls*, in 3 ZONING AND LAND USE CONTROLS ch. 22 (Rohan ed., 1989).

150. *Carpenter*, 804 F. Supp. at 1324. The *Carpenter* court found the final decision prong met on the basis that a moratorium made it futile to seek development permission. *Id.* The court then proceeded to the merits of the takings claim without requiring that the plaintiff seek compensation from the state. *Id.* Whether that is correct is unclear. Subsequent to *Carpenter*, the Ninth Circuit held that prong two of *Hamilton Bank* applies to interstate compact commissions which should be sued in state court. *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 622 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 60 (1993). A Washington state court, however, has held that the state is not liable for a county's costs in inverse condemnation. *Klickitat County v. State*, 862 P.2d 629, 634 (Wash. Ct. App. 1993).

151. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

152. *Id.*

153. 482 U.S. 304 (1987).

154. *Id.* at 315.

state court judges are bound to enforce the Constitution.<sup>155</sup> Thus, after *First English*, no state court is free to reject a compensation award where a taking is found.<sup>156</sup>

Prior to *First English*, some state courts, notably Florida, New York and California, rejected money damages as possible relief for regulatory takings.<sup>157</sup> These state courts are no longer free to make that choice.<sup>158</sup> No state court can assert that its law does not provide a compensation remedy since federal law, in effect a part of state law, provides that remedy.<sup>159</sup>

### A. *Prong Two Is Applicable to All Takings Claims*

All takings claims, physical and regulatory, are subject to the requirement that the property owner seek compensation from the state. The reason is inherent in the nature of the Fifth Amendment. The Fifth Amendment does not proscribe takings. The Fifth Amendment proscribes takings without compensation. The long standing rule of interpretation is that the mandate of the Fifth Amendment is satisfied by post-taking compensation.<sup>160</sup> Thus, if property owners think that government conduct by physical invasion or regulation has taken their property, they must bring an inverse condemnation action.

It should not matter whether the taking occurs by application of a law or the mere enactment of a law. The state violates the Fifth Amendment when it refuses to pay. In other words, prong two

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155. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (referring to the Constitution as “the fundamental and paramount law of the nation”); *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding that “[n]o state legislator or executive or judicial officer can war against the Constitution” where a state governor attempted to defy Supreme Court order).

156. See *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 475 (9th Cir. 1994) (“The remedy has been available since 1987, when the Supreme Court ruled in [*First English*] that California’s lack of a damages remedy for a regulatory taking was unconstitutional.”) (emphasis added) (citation omitted); *Tari v. Collier County*, 56 F.3d 1533, 1537 n.12 (11th Cir. 1995).

157. See, e.g., *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), *aff’d*, 447 U.S. 255 (1980); *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir.), *cert. denied*, 114 S. Ct. 439 (1993).

158. The Eleventh Circuit wrongly stated that it does not know “whether Florida [law] now [post *First English*] recognizes a cause of action wrought by regulatory takings.” *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1493 n.12 (11th Cir.), *cert. denied*, 114 S. Ct. 439 (1993). See *New Port Largo, Inc. v. Monroe County*, 873 F. Supp. 633 (S.D. Fla. 1994) for the correct analysis. The Eleventh Circuit later found that Florida explicitly recognized a cause of action for damages in inverse condemnation in *Reahard v. Lee County*, 30 F.3d 1412, 1417 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1693 (1995).

159. *Howlett v. Rose*, 496 U.S. 356, 369 (1990) (stating that a state court may not refuse to hear a federal claim without a valid excuse). The instances when state courts can refuse to hear federal claims are few and far between and not applicable to takings claims. See, e.g., *Testa v. Katt*, 330 U.S. 386, 394 (1947).

160. See *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). See generally *Roberts, Fifth Amendment, supra* note 20, at 482.

applies to facial claims and as applied claims.<sup>161</sup> Some authorities dispute this. In *Adamson Cos. v. City of Malibu*,<sup>162</sup> the court found a facial takings claim ripe in federal court without satisfying prong two<sup>163</sup> but the court mistakenly relied on *Yee v. City of Escondido*<sup>164</sup> to do so.<sup>165</sup> In *Yee*, the Supreme Court heard a facial takings claim and noted that the facial takings claim was not subject to prong one finality.<sup>166</sup> The *Yee* Court, however, had no occasion to address prong two. Prong two had been met since *Yee* came to the United States Supreme Court from the state courts.<sup>167</sup>

### B. Prong Two in *Nollan/Dolan* Type Exaction Cases

As discussed above,<sup>168</sup> some question exists as to the application of *Hamilton Bank's* first prong to exaction cases. Apparently, no property owner has specifically questioned the applicability of *Hamilton Bank's* second prong to the exaction cases. The issue merits discussion due to the following comment by Justice Stevens in his dissent in *Dolan*:

If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.<sup>169</sup>

Justice Stevens misplaces his apprehension if his reference to “micro-management” means the lower federal courts. As with economic impact claimants like *Lucas*, *Nollan/Dolan* type claimants who suffer a physical exaction raise a Fifth Amendment issue. No Fifth Amendment violation occurs when the government takes property. Only a

161. See *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 505-06 (9th Cir. 1990), cert. denied, 502 U.S. 943 (1991).

162. 854 F. Supp. 1476 (C.D. Cal. 1994).

163. *Id.* at 1496-97; see also *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164-65 (9th Cir. 1993) (assuming, without discussion, that the facial claim was ripe).

164. 503 U.S. 519 (1992).

165. *Adamson*, 854 F. Supp. at 1490.

166. 503 U.S. at 534.

167. *Id.* at 531-32. Other Supreme Court facial takings claims likewise came through the state courts, were against federal agencies, or were brought in federal court before *First English* when the state did not provide a compensation remedy. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (brought in federal court before *First English*); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (coming through the state court); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (against a federal agency); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (coming through the state court). For a full discussion, see Roberts, *supra* note 149, at 489.

168. See *supra* notes 57-86 and accompanying text.

169. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2326 (1994).

taking without compensation violates the Fifth Amendment. A cause of action arises when compensation is sought and denied and claimants can litigate this matter in state courts.

With *Lucas*-type economic impact cases, the property owner asks for compensation. If a taking is found, the state decides whether to pay temporary or permanent damages. With an exaction case, the property owner can go to state court to ask for invalidation of the exaction or compensation. If the requisite nexus exists, no taking occurs. If no nexus exists, the state can choose to drop the condition or pay for it.<sup>170</sup>

*Amoco Oil Co. v. Village of Schaumburg*<sup>171</sup> demonstrates that there is potential for confusion. In *Amoco*, the village conditioned Amoco's request for a special permit on Amoco's dedicating twenty percent of its land for a highway.<sup>172</sup> No nexus existed<sup>173</sup> and a federal challenge ensued.<sup>174</sup> While the case was pending, the village revoked the permit.<sup>175</sup> This left Amoco with no requirement of dedication and no permit.<sup>176</sup> Amoco convinced the federal district court that the exaction was invalid under *Nollan*.<sup>177</sup> The *Amoco* court nonetheless dismissed the case and directed the developer to state court.<sup>178</sup> The court was satisfied that the Illinois courts reviewed special permit denials with *Nollan*-like scrutiny<sup>179</sup> and that Amoco was likely to obtain a state court ruling that the reason for the permit denial was arbitrary.<sup>180</sup>

The *Amoco* court opined in dicta that if the state court found a non-arbitrary denial, Amoco could return to federal court.<sup>181</sup> Property owners should not rely on this. *Hamilton Bank* says that when a city takes property without paying for it, the property owner goes to the state courts.<sup>182</sup> In an *Amoco*-type case, the property owner would go to state court and assert that the denial of the permit was wrong. The

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170. Compensation might be due for the period of the delay under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

171. 1992 WL 229591 (N.D. Ill. Sept. 11, 1992).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at \*1.

177. *Id.* at \*2.

178. *Id.* at \*6.

179. The state court would have no choice but to apply *Nollan* and *Dolan* to Fifth Amendment claims. See *supra* note 152 and accompanying text.

180. *Amoco*, 1992 WL 229591 at \*5.

181. *Id.*

182. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

property owner would then request that either a permit be issued without the condition or that the state be ordered to pay compensation for the dedication. If the state court in response says to the developer, "I think that the condition is validly imposed. If you want the permit, you must dedicate the land," then that constitutes a lower court finding that a nexus exists. That finding equals a determination that no taking has occurred and no compensation is due. Furthermore, that finding renders the case ripe, subject to direct appeal, and not subject to collateral attack in federal court.<sup>183</sup>

*Nollan* and *Dolan* demonstrate the feasibility of trying these issues in state court.<sup>184</sup> Both parties lost at the state level on the issue of legitimacy of the condition. Both appealed directly to the United States Supreme Court and prevailed.<sup>185</sup> If the Nollans or Dolan had gone to federal district court after the state courts had found the conditions valid, the federal courts would have been obliged to give full faith and credit to those findings.

### C. *The Nature of the Remedy: Federal or State?*

Since the Constitution mandates a compensation remedy, the procedure need not be statutorily authorized.<sup>186</sup> State courts will hear a takings claim even if the contours of the action are somewhat uncertain.<sup>187</sup> Some courts have found an available remedy based on independent state constitutional guarantees similar to the Fifth Amendment.<sup>188</sup> This unnecessary process complicates matters.

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183. See Roberts, *Fifth Amendment*, *supra* note 20, at 484-88.

184. See *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

185. *Dolan*, 114 S. Ct. at 2309; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830-31 (1987).

186. See generally *Southview Assocs. v. Bongartz*, 980 F.2d 84, 100 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); *J. B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 308-09 (10th Cir. 1992); *Lerman v. City of Portland*, 675 F. Supp. 11, 16 (D. Me. 1987); *Drake v. Town of Sanford*, 643 A.2d 367, 369 (Me. 1994).

187. See *Southview Assocs.*, 980 F.2d at 99-100, where the court's research revealed no reported state regulatory takings case. However, the court found a state constitutional provision protecting property from damage and cases providing monetary relief for physical damage. *Id.* at 100. Based upon this finding, the court concluded that relief would be available in state court. *Id.* Resort to the Vermont courts was thus required. *Id.*

188. The Second Circuit, for example, noted that the Vermont Constitution had been interpreted to require the government to compensate property owners for physically damaged property. *Southview Assocs.*, 980 F.2d at 100. Thus, the Second Circuit found that a state remedy for a regulatory taking could likewise be recognized in Vermont. *Id.* at 100. The Tenth Circuit recognized that Utah's Constitution provided for compensation and found implicit the availability of a state judicial remedy. *J. B. Ranch*, 958 F.2d at 308-09. See also *Anderson v. Alpine City*, 804 F. Supp. 269, 274 (D. Utah 1992).

Two grounds cause confusion. First, *Hamilton Bank* referred to state law as evidence of how to fulfill the requirement.<sup>189</sup> Second, *Hamilton Bank*, preceding *First English* by two years, held that a property owner had to resort to state remedies where adequate.<sup>190</sup> As proof of adequacy in *Hamilton Bank*, the Court cited Tennessee statutes that allowed an inverse condemnation action.<sup>191</sup> The Tennessee Constitution's analogue to the Fifth Amendment formed the basis of the inverse condemnation statutes. However, since the right to compensation is self-executing, the right to compensation in the Tennessee state court would have existed even if the legislature had not enacted the statute<sup>192</sup> and even if the Tennessee Constitution had lacked a takings clause.<sup>193</sup>

While the self-executing nature of the Fifth Amendment's Just Compensation Clause renders unnecessary state constitutional or statutory authorization,<sup>194</sup> state legislatures are free to adopt procedures for litigants to pursue this right.<sup>195</sup> A state may establish administrative mechanisms to adjudicate inverse condemnation claims.<sup>196</sup>

When a property owner looks for a state procedure to bring a takings claim, the search quickly leads to the state's detailed eminent domain code. These codes present two difficulties. First, state legislatures generally enact eminent domain statutes primarily to address direct condemnations. The statutes address inverse condemnation indirectly, if at all.<sup>197</sup> Second, there is no express statement on whether the state legislatures designed these statutes solely to

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189. *Hamilton Bank*, 473 U.S. at 196.

190. *Id.* at 194.

191. *Id.* at 196.

192. See *Brooksbank v. Roane County*, 341 S.W.2d 570, 573 (Tenn. 1960).

193. See *Alper v. Clark County*, 571 P.2d 810, 811 (Nev. 1977).

194. *Bacich v. Board of Control*, 144 P.2d 818, 821 (Cal. 1943).

195. See *Horn v. City of Chicago*, 87 N.E.2d 642, 649 (Ill. 1949) (holding that the legislature can require that the inverse condemnation action be pursued within a specified period of time).

196. *Department of Agric. & Consumer Servs. v. Bonanno*, 56 8 So. 2d 24, 28-29 (Fla. 1990) (finding no constitutional right to jury trial on inverse condemnation claims where statute provided administrative mechanism for a hearing to determine what constituted just or full compensation for destroyed plants). Not just any administrative procedure will suffice to adjudicate a takings claim. See *Healing v. California Coastal Comm'n*, 27 Cal. Rptr. 2d 758, 768 (1994) (holding that a petition to review an administrative mandate was not an adequate procedure to determine inverse condemnation issues, in part because the administrative agency was not vested with adjudicatory powers to decide issues of constitutional magnitude; landowner entitled to present matter to state trial court).

197. Some state eminent domain statutes have been held inapplicable to inverse condemnation actions. See *Drake v. Town of Sanford*, 643 A.2d 367 (Me. 1994); see also *infra* note 210.

administer<sup>198</sup> state constitutional just compensation requirements or to administer Fifth Amendment takings claims as well.

A sampling of state eminent domain statutes shows the ill fit of such statutes with regulatory takings actions. Section 29-16-123(a) of the Tennessee Code Annotated, entitled "Action initiated by owner," provides:

If, however, such person or company *has actually taken possession* of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.<sup>199</sup>

The requirement that the condemnor "has actually taken possession" is easy to apply in some inverse condemnation situations like flood damage or overflights. But what about regulatory limits on use? The Tennessee courts have interpreted the above statute to apply to zoning restrictions,<sup>200</sup> but that interpretation was not the only rational response possible.

Section 1-26-516, Wyoming Statutes, entitled "Action for inverse condemnation," provides:

When a person possessing the power of condemnation takes possession of or damages land in which he has no interest, or substantially diminishes the use or value of land, *due to activities on adjoining land* without the authorization of the owner of the land or before filing an action of condemnation, the owner of the land may file an action in district court seeking damages for the taking or shall be granted litigation expenses if damages are awarded to the owner.<sup>201</sup>

The Wyoming statute appears applicable to zoning enactments that destroy land use "due to activities on adjoining land."<sup>202</sup>

North Carolina's inverse condemnation law provides that

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198. Because the right is self-executing, the use of the word "implement" would be inappropriate.

199. TENN. CODE ANN. § 29-16-123(a) (1995) (emphasis added). This provision was cited by Justice Blackmun in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 196 (1985), to show the availability of an inverse condemnation action in Tennessee state court.

200. *Davis v. Metropolitan Gov't of Nashville*, 620 S.W.2d 532, 534 (Tenn. Ct. App. 1981).

201. WYO. STAT. § 1-26-516 (Supp. 1995) (emphasis added).

202. See Rodney Lang, *Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure*, 18 LAND & WATER L. REV. 739, 761 (1983).

[i]f the property has been taken by an act or omission of a condemnor . . . and no complaint containing a declaration of taking has been filed the owner of the property, may initiate an action to seek compensation for the taking. The action may be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later.<sup>203</sup>

Section 40A-3(b) of the North Carolina General Statutes defines local public condemnors as “the governing body of each municipality or county . . . [that] possess the power of eminent domain and [that] may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes . . . .”<sup>204</sup> The statute then lists as purposes: roads, public enterprises, parks, sewers, hospitals, cemeteries, libraries, drainage, and “[a]cquiring designated historic properties.”<sup>205</sup> On its face, the North Carolina statute fails to deal with excessive exercises of regulatory powers.

Statutes, like those above, are not necessarily inappropriate to deal with regulatory takings claims, but they create confusion for litigants trying to identify the proper claim to file. For example, a tendency exists to refer to the fulfillment of prong two as seeking compensation under “state law.”<sup>206</sup> It is state law in the sense that state procedures are used to assert the right, but litigants assert a Fifth Amendment right.<sup>207</sup> Yet, due to the fact that only an *uncompensated* taking violates the Fifth Amendment, some courts have taken the position that the claim presented to the state courts is not a federal claim since the federal claim, unripe under *Hamilton Bank*, does not yet exist.<sup>208</sup>

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203. N.C. GEN. STAT. § 40A-51 (1994).

204. N.C. GEN. STAT. § 40A-3(b) (1994).

205. N.C. GEN. STAT. § 40A-3(b) (1994).

206. See Roberts, *Fifth Amendment*, *supra* note 20, at 492.

207. However, in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), the Ninth Circuit Court found that the pursuit of compensation for a taking in state court under the mandate of *Hamilton Bank* was not a Fifth Amendment claim, but merely a resort to state substantive law. The court reached this conclusion despite its acknowledgement that *First English* said that claims for compensation are grounded in the Constitution. *Id.* at 861. Still the limited reading of *Hamilton Bank* was prompted, the majority said, because a contrary ruling would “deny a federal forum to every takings claimant.” *Id.* at 860. The *Dodd* court did, however, recognize that the pursuit of the state law claim in state court might preclude relitigation in federal court by way of claim or issue preclusion rules. *Id.* The court found that claim preclusion would not bar the claim because, under Oregon law, state courts had consented to claim splitting. *Id.* at 862. The court remanded the matter for a determination as to whether issue preclusion applied. *Id.* at 863.

208. See, e.g., *Impink v. City of Indianapolis*, 612 N.E.2d 1125, 1127 (Ind. Ct. App. 1993); see also *Bakken v. City of Council Bluffs*, 470 N.W.2d 34 (Iowa 1991) (holding that the state court should dismiss a section 1983 claim due to the property owner’s failure to use the state’s inverse condemnation procedure).

Looking at prong two as one of “state law” can have unusual and unfortunate results. This view led the Maine Supreme Court in *Drake v. Town of Sanford*<sup>209</sup> to take the position that the Maine state courts had no jurisdiction over a Fifth Amendment takings claim until the party sought compensation under the state constitution.<sup>210</sup> In *Drake*, the plaintiff property owners filed an action in state court alleging that the town’s shoreland zoning ordinance had taken their property without compensation in violation of the federal and state constitutions.<sup>211</sup> This claim paralleled *Foss v. Maine Turnpike Authority*,<sup>212</sup> a prior state supreme court opinion. The *Foss* court held that while no Maine statute provided for an inverse condemnation suit, such a right existed at common law based on the federal and state constitutions.<sup>213</sup> At trial, the plaintiffs dismissed with prejudice their claim under the state constitution.<sup>214</sup> A jury found a taking based on the Fifth Amendment.<sup>215</sup>

On appeal, the Maine Supreme Court overturned the jury’s verdict and dismissed the case for lack of jurisdiction.<sup>216</sup> The court decided that the case was not ripe until the plaintiffs resorted to “the state procedure” for determining compensation; “the state procedure” meant a claim based on the Maine Constitution.<sup>217</sup> The plaintiffs’

209. 643 A.2d 367 (Me. 1994).

210. *Id.* When a party files in the state court and the state court adjudicates the claim, as it must, then res judicata normally prevents relitigation in the federal court. In *Drake*, the plaintiffs dismissed their state constitutional claim and proceeded to trial on the Fifth Amendment claim and won. *Id.* at 368-69. On appeal, the Maine Supreme Court said that it had no jurisdiction over the federal claim because the claim was not ripe. *Id.* at 369. The state court’s refusal to hear the Fifth Amendment claim was evidence of an inadequate state procedure entitling the plaintiffs to present a ripe claim in federal court. The dismissal with prejudice of the state takings claim was not relevant to the fact that the Fifth Amendment claim was thrown out of court. In other words, the opinion establishes the plaintiffs’ inability to get the state to hear the claim.

In *Impink*, 612 N.E.2d at 1128, a claim was dismissed by a state court where the claimant did not use the state inverse condemnation statute for a state takings claim, but apparently directly invoked the general jurisdiction of the court to hear federal claims. Indiana law provides that “[a]ny person having an interest in any land which has been or may be taken for any public use without having first been appropriated under this or any prior law may proceed to have his damages assessed under this chapter, substantially in the manner herein provided.” IND. CODE ANN. § 32-11-1-12 (Burns 1995).

211. *Drake*, 643 A.2d at 367.

212. 309 A.2d 339 (Me. 1973).

213. *Id.* at 344-45. *Foss* held that “while it is true that the Legislature may authorize that which otherwise would be a ‘nuisance’ or ‘trespass,’ it is equally true that the Fifth Amendment of the United States Constitution prohibits the ‘taking’ of property for public use without ‘just compensation.’” *Id.* at 344. See also ME. CONST. art. I, § 21.

214. *Foss*, 309 A.2d at 339.

215. *Id.*

216. *Id.*

217. The *Drake* court premised its holding on a federal court decision, *Lerman v. City of Portland*, 675 F. Supp. 11 (D. Me. 1987), cert. denied, 493 U.S. 894 (1989). The *Drake* court held

dismissal of that claim meant that they had not completed *Hamilton Bank's* prong two.<sup>218</sup> This decision was an unnecessary and wasteful interpretation of *Hamilton Bank*.

The Maine Supreme Court erred in failing to recognize that a state court has an obligation to enforce federal rights. A property owner has a federal constitutional claim under the Fifth Amendment enforceable in state court independent of the state constitution. While a state can compel a litigant to follow its procedures, a state should not use prong two to force a property owner to rely on the state constitution or some other source of state substantive law. All states have some counterpart to the Fifth Amendment requiring compensation for takings.<sup>219</sup> In some states the protection conferred by the state constitution is greater than that conferred by the federal constitution.<sup>220</sup> Nonetheless, states are not required to have just compensation clauses in their constitutions, nor must they interpret them to provide as much protection as the Fifth Amendment provides.<sup>221</sup>

that the state's common law remedy was based solely on the state constitution. 643 A.2d at 367. The *Lerman* court, misreading Maine law, held that "Maine law provides relief [in the form of compensation for a taking] under the Maine Constitution . . ." 675 F. Supp. at 15. The federal court's authority originated in *Foss*; but, as noted, *Foss's* primary authority for finding that state agencies in Maine would be liable in a common law action for taking property was not the state constitution, as approved by *Lerman*, but the United States Constitution. *Foss*, 309 A.2d at 344. Thus, while the plaintiffs in *Drake* sued in state court based on either the federal or state constitution as *Foss* said they could do, the court dismissed their claim. *Drake*, 643 A.2d at 370.

218. The *Drake* court noted that the dismissal of the state constitutional claim with prejudice might mean that the claim could never ripen. 643 A.2d at 369. The plaintiffs' claim under the state constitution was independent of the federal claim. The fact that it was dismissed had no bearing on the plaintiffs' Fifth Amendment right to ask the state (through its state court) to pay them for their loss. The court noted that "the *only* claim requesting damages for the alleged taking *under state law*, was dismissed with prejudice." *Id.* (emphasis added). This decision was erroneous; the plaintiffs also asked for damages *under federal law*.

219. In at least two states, North Carolina and New Hampshire, the right to compensation is only implied. See 1 NICHOLS' THE LAW OF EMINENT DOMAIN § 1.3 (Patrick J. Rohan et al. eds., rev. 3d ed. 1995).

220. A number of state constitutions say that property cannot be "taken or damaged" without compensation being paid. 2A NICHOLS' THE LAW OF EMINENT DOMAIN § 6.02[2][c] (Patrick J. Rohan et al. eds., rev. 3d ed. 1995). Whether the word "damage" extends protection beyond a "taking" has been the subject of debate. *Id.* at § 6.02[2][d]. See *Citizens Utils. Co. v. Metropolitan Sanitary Dist.*, 322 N.E.2d 857 (Ill. App. Ct. 1974) (construing the Illinois constitutional provision regarding "taken or damaged" property to be broader than the Fifth Amendment). See also *Donaldson v. City of Bismarck*, 3 N.W.2d 808 (1942). However, note that both of these cases wrongly assume that the Fifth Amendment does not apply to the states; the Fifth Amendment applies by incorporation. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (finding that the Takings Clause of the Fifth Amendment of the United States Constitution is made applicable to the States through the Fourteenth Amendment).

221. States cannot refuse to enforce the Fifth Amendment or interpret it in a manner to provide less protection than the Supreme Court requires. See *supra* note 156 and accompanying text.

State statutes, like those discussed above, simply say that where state agents take property the state shall pay. The statutes normally do not identify a source, and state courts may conclude that the state constitutional guarantees form the basis of the statutes.<sup>222</sup> Yet, these statutes may just as well be seen as having their basis in the Fifth Amendment.<sup>223</sup> If the state channels such actions through its inverse condemnation procedures and recognizes that the process that exists to implement a state constitutional requirement is also a logical way to litigate a similar federal constitutional requirement, then no harm is done to the federal right. However, the federal right is harmed if it is not allowed to be asserted, as was done in *Drake*.

Undue emphasis on the label chosen by the property owner pursuing compensation in state court runs a risk of reestablishing the tyranny of the common law forms of action that supposedly were buried years ago. This lack of clarity over whether the state condemnation procedure or a common law action should be used compels attorneys for property owners to carefully study state law.

#### D. *Res Judicata Implications of Pursuing State Court Relief*

Once a property owner completes prong two, the law of res judicata usually precludes a Fifth Amendment claim from being pursued in federal court.<sup>224</sup> Adjudication of the claim in state court bars a subsequent suit in federal court under the full faith and credit statute.<sup>225</sup> Collateral attack of the state court judgment is not permitted.<sup>226</sup> This limits property owners who are dissatisfied with the results obtained from the state court to appeal directly to the United States Supreme Court.

This is true even if a court takes the position discussed above<sup>227</sup> that the state claim must be litigated first since the federal claim is unripe. Once the state claim is litigated, the rule of issue preclusion will likely bar a suit in federal court on the federal claim since the

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222. See *Brooksbank v. Roane County*, 341 S.W.2d 570 (Tenn. 1960).

223. See *Galt v. Montana*, 749 P.2d 1089 (Mont. 1988) (recognizing that the right to just compensation was protected and measured by both the federal and state constitution); *Herman v. Southern Pac. Co.*, 445 P.2d 186 (Ariz. Ct. App. 1968) (finding same).

224. For a complete discussion of this issue, see *Roberts*, *Fifth Amendment*, *supra* note 20, at 479.

225. 28 U.S.C. § 1738 (1988 & Supp. V 1993). See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *American Nat'l Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547, 1550 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987).

226. See *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 365 (9th Cir. 1993); *Peduto v. City of N. Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989).

227. See *supra* notes 207-218 and accompanying text.

issues being tried under the state constitution's takings clause would be the same.<sup>228</sup>

The Eleventh Circuit has suggested a "possible exception" to the doctrine of *res judicata*.<sup>229</sup> The "possible exception" is a reservation of the right to litigate federal rights in federal courts under the doctrine laid down in *England v. Louisiana State Board of Medical Examiners*.<sup>230</sup> Critics disagree, however, over whether a reservation of rights can be made in state-initiated proceedings.<sup>231</sup>

In sum and perhaps ironically, the action required to make a claim ripe also terminates the claim. This is surprising to those who are misled by the language of ripeness, which suggests that the state law suit is merely preparatory to a federal suit. The harm of this misleading language is discussed below.<sup>232</sup> The following section explores the one narrow instance where litigants can avoid the bar of *res judicata*.

#### E. Prong Two Futility or Inadequacy

The property owner bears a difficult burden to establish inadequacy of the state's compensation remedy.<sup>233</sup> Uncertainty automatically does not equal inadequacy of state remedies.<sup>234</sup> Also, if the property owner allows the state statute of limitations to run, that property owner forfeits any right to seek compensation in federal court.<sup>235</sup> If the court dismisses with leave to amend the property owner's state action and the property owner fails to amend, no federal suit will lie.<sup>236</sup>

In rare instances, prong two futility can be established by proving that the state courts have rejected takings claims that are on all fours with the challenger's case. Since takings claims are usually highly ad

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228. See *Palomar*, 989 F.2d at 365 (discussing the rules of issue preclusion).

229. *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1496 (11th Cir.), *cert. denied*, 114 S. Ct. 439 (1993); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992).

230. 375 U.S. 411 (1964).

231. See *Roberts*, *Fifth Amendment*, *supra* note 20, at 502 n.106.

232. See *infra* part VI.

233. See *Belvedere Military Corp. v. County of Palm Beach*, 845 F. Supp. 877, 879 (S.D. Fla. 1994) (holding that if the Florida state court had "unequivocally indicated that an individual in [the] Plaintiffs' situation had no cause of action under state law," then they need not bother asking).

234. See *Aiello v. Browning-Ferris, Inc.*, 1993 WL 463701 (N.D. Cal. Nov. 2, 1993) (finding that although state law is not clear on whether a private party acting under the color of law is liable in an inverse condemnation action, the plaintiff nevertheless is required to resort to state court).

235. *Gamble v. Eau Claire County*, 5 F.3d 285 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1096 (1994).

236. *Belvedere*, 845 F. Supp. at 879.

hoc affairs, this will not often occur.<sup>237</sup> However, it does happen. The court in *Naegele Outdoor Advertising, Inc. v. City of Durham*<sup>238</sup> deemed ripe in federal court a challenge to a five and one half year billboard amortization ordinance.<sup>239</sup> No pursuit of a suit in the state court preceded the claim in the federal court since the North Carolina state courts had, on several occasions, upheld the same type of amortization ordinance.<sup>240</sup> The federal court concluded that a five and one half year sign amortization provision would not be viewed as a taking by the North Carolina courts and that it would be pointless to ask the state court for relief. The Ninth Circuit made a similar finding with respect to certain rent control statutes as they were been construed in California state courts.<sup>241</sup>

Finally, if the government defendant removes a takings case to federal court, the federal court may appropriately find that prong two cannot be met.<sup>242</sup>

#### V. RIPENESS FOR DUE PROCESS AND EQUAL PROTECTION CLAIMS

In addition to or instead of a Fifth Amendment takings claim, property owners often assert Fourteenth Amendment due process and equal protection challenges to land use restrictions. These Fourteenth Amendment challenges include (1) substantive due process takings claims, (2) substantive due process arbitrary and capricious claims, (3) procedural due process claims, and (4) equal protection claims.<sup>243</sup> Property owners are less likely to prevail on the merits of these claims since courts give greater deference to government action under these

237. See, e.g., *Rockler v. Minneapolis Community Dev. Agency*, 866 F. Supp. 415, 417-18 (D. Minn. 1994).

238. 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir.), *cert. denied*, 115 S. Ct. 317 (1994).

239. *Id.*

240. *Id.* at 1073. Initially, the state supreme court had found such schemes not per se unconstitutional as applied to a three year provision for the removal of junk yards. *State v. Joyner*, 211 S.E.2d 320 (N.C. 1975), *appeal dismissed*, 422 U.S. 1002 (1975). Had that been the extent of the law on the subject, a challenge as to sign amortization would not have been futile since one premise of the *Joyner* case was that the validity of amortization schemes would be examined on a case by case basis. Two later intermediate court of appeals decisions, however, had ruled in favor of billboard amortization. *Summey Outdoor Advertising, Inc. v. County of Henderson*, 386 S.E.2d 439 (N.C. Ct. App. 1989); *R.O. Givens, Inc. v. Town of Nags Head*, 294 S.E.2d 388 (N.C. Ct. App. 1982).

241. See *Schnuck v. City of Santa Monica*, 935 F.2d 171 (9th Cir. 1991).

242. See *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

243. The resulting confusion with respect to the overlapping nature of these claims creates a major impediment to clarity. See, e.g., *Rockler v. Minneapolis Community Dev. Agency*, 866 F. Supp. 415, 420 (D. Minn. 1994) (referencing enigmatically to procedural and substantive due process claims that "fall squarely within the federal takings claim"). See also discussion in *CALLIES*, *supra* note 3, at 311-12.

theories than under the Takings Clause. The question here is whether the ripeness considerations differ.

*Hamilton Bank* applied the final decision rule not only to Fifth Amendment takings claims but also to those substantive due process claims<sup>244</sup> that allege, in a manner identical to the Fifth Amendment, that a regulation has gone too far. This is the basis for the so-called due process takings claim.<sup>245</sup>

The *Hamilton Bank* opinion did not refer expressly to the just compensation prong in its due process discussion. However, other courts have held that consistency with the rationale of *Hamilton Bank* regarding the Fifth Amendment claim requires that a party asserting a “due process taking” must seek compensation from the state.<sup>246</sup> The point should not matter since it is unlikely that such a cause of action will continue to be recognized in federal court.<sup>247</sup>

Most courts have held that the final decision requirement applies to as applied arbitrary and capricious substantive due process claims.<sup>248</sup> Similar to the case with the Fifth Amendment, the final decision requirement is not applicable to facial claims.<sup>249</sup> The compensation requirement has not been held to apply to substantive due process arbitrary and capricious claims.<sup>250</sup>

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244. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 197 (1985).

245. *Id.* at 197. See *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922); see also *Eide v. Saratoga*, 908 F.2d 716, 721-22 (11th Cir. 1990) (comparing substantive due process and Fifth Amendment takings claims), *cert. denied*, 498 U.S. 1120 (1991).

246. See *Southview Assocs. v. Bongartz*, 980 F.2d 84, 98 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); *Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm'rs*, 972 F.2d 309 (10th Cir. 1992); *Baranowski v. Borough of Palmyra*, 868 F. Supp. 86 (M.D. Pa. 1994); *Rockler*, 866 F. Supp. at 420 (holding procedural and substantive due process claims that “fall squarely within the federal takings claim” to be unripe until compensation is sought in state court). But see *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1988) (rejecting “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”), *cert. denied*, 494 U.S. 1016 (1990).

247. See *CALLIES*, *supra* note 3, at 311-12 (discussing takings and due process claims and the suggestion that a due process takings claim is subsumed by the explicit guarantees of the Fifth Amendment); see also *Miller v. Campbell County*, 945 F.2d 348 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1174 (1992); *Pearson v. City of Grand Blanc*, 756 F. Supp. 314 (E.D. Mich. 1991), *aff'd on other grounds*, 961 F.2d 1211 (6th Cir. 1992).

248. See, e.g., *Christopher Lake Dev. Co. v. Saint Louis County*, 35 F.3d 1269 (8th Cir. 1994); *Southview Assocs.*, 980 F.2d at 84; *Eide*, 908 F.2d at 716; see also *Anderson v. Alpine City*, 804 F. Supp. 269, 273 n.5 (D. Utah 1992) (exploring the Tenth Circuit’s view as to ripeness for due process claims).

249. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.), *cert. denied*, 115 S. Ct. 193 (1994).

250. *Southview Assocs.*, 980 F.2d at 96; *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574 (11th Cir. 1989); *Riverdale*, 816 F. Supp. at 942; *Patrick Media Group, Inc. v. City of Clearwater*, 836 F. Supp. 833 (M.D. Fla. 1993); *Cox v. City of Lynnwood*, 863 P.2d 578, 583 (Wash. Ct. App. 1993).

Generally, courts exempt procedural due process claims from the final decision requirement,<sup>251</sup> but equal protection claimants still must seek a final decision from state authorities.<sup>252</sup> Courts have differed over whether the compensation requirement applies to procedural due process<sup>253</sup> and equal protection claims.<sup>254</sup>

#### VI. CONCLUSION: ARE THE RIPENESS RULES UNDUE BURDENS OR A HOAX?

Critics disagree over whether compliance with the final decision rule is more analogous to fording a raging river or stepping over a trickle of a stream. For one commentator, "no rationality [exists] in the ripeness law" and "anarchy" reigns with lower courts' efforts to provide clarity. In the absence of sound guidance from the Supreme Court, the lower court's efforts are doomed to futility.<sup>255</sup> For another commentator, the courts have developed a "predictable and understandable body of law" and have been "remarkably tolerant of developers' efforts to reach the federal courts."<sup>256</sup>

My view is that some clarification is needed and that an accurate reading of *Hamilton Bank* and *MacDonald* would do the job. Much of the stringency of the final decision rule has come from the lower federal courts' expansion of those cases beyond their bounds. This, presumably, is traceable in large part to the desire of these courts, for good and bad reasons, to keep land use cases off their dockets.

Statutory solutions should also be explored. Florida's property rights legislation adopted in 1995, for example, creates final decision ripeness by compelling a municipality to issue a ripeness determination after the property owner files notice of intent to sue.<sup>257</sup> The

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251. See *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 895 (6th Cir. 1991); *Landmark Land Co. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989). But see *New Port Largo, Inc. v. Monroe County*, 873 F. Supp. 633, 640 (S.D. Fla. 1994); *Baldini West, Inc. v. New Castle County*, 852 F. Supp. 251 (D. Del. 1994).

252. See *Bannum v. City of Louisville*, 958 F.2d 1354, 1362 (6th Cir. 1992); *Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir. 1988); *Herrington v. County of Sonoma*, 834 F.2d 1488, 1494 (9th Cir. 1987), cert. denied, 489 U.S. 1090 (1989); *Harris v. City of Wichita*, 862 F. Supp. 287, 290 (D. Kan. 1994).

253. Compare *Riverdale Realty Co. v. Town of Orangetown*, 816 F. Supp. 937, 942 (S.D.N.Y. 1993); *Rockler v. Minneapolis Community Dev. Agency*, 866 F. Supp. 415, 418 (D. Minn. 1994) (holding that procedural and substantive due process claims that "fall squarely within the federal takings claim" are unripe until compensation is sought in state court) with *Picard v. Bay Area Regional Transit Dist.*, 823 F. Supp. 1519, 1523 (N.D. Cal. 1993); *New Port Largo, Inc. v. Monroe County*, 873 F. Supp. 633 (S.D. Fla. 1994).

254. Compare *Riverdale*, 816 F. Supp. at 942 with *Patrick Media Group*, 836 F. Supp. at 833.

255. Berger, *supra* note 90, at 37-38.

256. Lyman, *supra* note 8, at 127.

257. See 1995, Fla. Laws ch. 95-181. The statute authorizes a property owner to file a notice of claim after having an application for development permission turned down. The govern-

ripeness determination must list the allowable uses for the property. This commendable solution comes after a statutorily mandated settlement process. The government will have had ample opportunity to review the desired reach of its laws and can hardly complain of being prematurely hauled into court. Furthermore, the property owner has an assurance that enough requests have been filed.

More troubling is prong two and the paradoxical consequences that result from the mixture of ripeness law and the law of full faith and credit. One understandable reaction to the prong two requirement of *Hamilton Bank* is that it perpetrates a fraud or hoax on landowners. The courts say: "Your suit is not ripe until you seek compensation from the state courts." When the property owner complies, a federal court suit is barred by collateral estoppel and res judicata. While it is unfortunate that courts continue to use misleading ripeness language, the result is justifiable if one thinks that one lawsuit is enough.

Beyond the misleading ripeness language, the litigant incurs no harm simply by being barred from federal court. If the property owner's lawyer knows the law, the property owner can avoid a wasted effort in federal court. In the alternative, if the property owners come to federal court, they come with the knowledge that they are likely to fail if the government defendant or the court *sua sponte* raises the jurisdictional defense of ripeness.<sup>258</sup>

There is a denial of a federal forum but our dual system presumes state court competency. No injury inures to property owners as a class unless one thinks that state courts are likely to be hostile to property owners' rights. Undoubtedly, state courts vary in the deference they accord local land use decisions. Even if hostility exists in some courts, the same would likely be true in federal courts. Numer-

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mental entity must then "put up or shut up." It can develop a number of settlement offers. If no settlement is reached, section 1 (5)(a) compels a written ripeness determination. A federal court would still need to determine that an Article III controversy existed.

For other takings legislation calling for compensation, see the Texas Private Real Property Rights Preservation Act, 1995 Tex. Sess. Law Serv. Ch. 517 (S.B. 14) (Vernon) (to be codified at TEX. GOV'T CODE Ch. 2007).

See also Protection of Private Property Act, WASH. REV. CODE § 36.70A.370 (Supp. 1992). This statute arguably has an implicit ripeness rule. This statute provides that "compensation must be paid to the owner of private property within three months of the adoption of a regulation." *Id.* § 4 (3). It sounds as if the right automatically arises after the passage of time from adoption. The Washington act was suspended pending a November 1995 statewide election.

258. As a matter of subject matter jurisdiction, ripeness can be raised at any time, even on appeal. See *Unity Ventures v. County of Lake*, 841 F.2d 770, 774 (7th Cir. 1988); see also Thomas E. Roberts, *Ripeness after Lucas*, in *AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION* 13-14 (David L. Callies ed., 1993).

ous federal judges have decried being turned into super zoning boards of appeal. Judge Posner has complained of federal courts hearing "garden variety zoning dispute[s] dressed up in the trappings of constitutional law."<sup>259</sup> The denigrating tone of these pronouncements suggests that the outcome for property owners in many instances would be no better, and might be worse, in federal court.

Two solutions emerge if the matter is thought to be in need of change: rewrite the law of res judicata and full faith and credit or rewrite the law of the Fifth Amendment. In rewriting the law of res judicata, the Court or Congress might address the paradox and conceivably say that the second suit in federal court is not barred by the full faith and credit statute. Such a ruling or statute, however, would require a decision as to whether the principles and policies behind full faith and credit and the law of finality of judgments should give way to replication of matters once litigated. Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten. This anomaly, however, is not necessarily bad. The additional lawsuits might not cause the federal judiciary to collapse, but they would use the limited resources of courts already busy.

If one insists on opening the lower federal courts to these suits, judicial economy would be better served by having just one lawsuit. This could be achieved by reexamining the rule that the Fifth Amendment does not require pre-taking compensation.<sup>260</sup> This rule lies behind prong two's view of the Fifth Amendment that no cause of action exists until demand is made on the state, and the state refuses to pay. The language of the Fifth Amendment does not dictate this rule.

In the context of inverse condemnation, the Fifth Amendment could be read as providing that a taking occurs upon the adoption or application of an excessive or illegal regulation. Regarding as applied claims, a property owner would have to obtain a final decision. After obtaining a final decision, the property owner would then sue either in state or federal court. As to facial claims, prong one not being applicable, the choice of forums would exist upon enactment. With this reinterpretation, at least only one lawsuit would be viable. The

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259. *Coniston v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988). See generally Roberts, *Forum Selection*, *supra* note 20, at 1.

260. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). See also Roberts, *Fifth Amendment*, *supra* note 20, at 481-82.

state, the wrongdoer in the sense that it took property without paying, could hardly complain that it must defend itself in federal court for violating federal rights. The increased workload on the lower federal courts might affect the inclination to overturn this longstanding rule of inverse condemnation. That, in part, may depend on whether those courts are already obligated to hear land use claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. If so, perhaps the takings claim related to the same facts might be seen as an insignificant addition.

I do not advocate these changes. Federal courts are busy enough. State judges are more familiar with land use disputes and can do a better job of evaluating local and state interests. Further, the bar is not total. Where state courts have definitively ruled out takings claims, a federal action will lie.<sup>261</sup> Finally, I am not convinced that state judges in general harbor hostilities to property owners that would, if true, support the availability of the more independent federal judiciary.

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261. See *supra* notes 236-40 and accompanying text.