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Pinpointing the Beginning and Ending of a Temporary Regulatory Taking

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Abstract: The Supreme Court has held that if a government body regulates land to such an extent that it effectively takes the property, then it must pay just compensation to the landowner. Even if the government elects to rescind the offending regulation, it still must provide compensation to the owner for the duration of the regulatory taking. Unfortunately, the Court has had no occasion to determine when such temporary regulatory takings become effective and when they terminate, and the lower courts only rarely have reached these difficult remedial questions.

This Article seeks to pinpoint precisely when a temporary regulatory taking begins and ends. After examining the few clues that the Supreme Court has provided, the Article proposes a model that accords with this limited case law but that offers substantially more guidance than the Court has managed to furnish so far. The Article then tests this model by examining the extent to which it conforms to the small number of lower court opinions to address these issues. The model proposed here will be useful to property owners, planners, and regulators who wish to determine the use of land; to the attorneys who must advise them; to the judges who must resolve their disputes; and to legal scholars who continue to struggle to find some coherence in takings law.

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The relatively new technique of temporary taking by eminent domain is a most useful administrative device. . . . However, the use of the temporary taking has spawned a host of difficult problems, . . . especially in the fixing of the just compensation.[1]

The true rule would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made . . . . And if a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary, by the forms of law, to conduct the inquiry; and this delay must be compensated by interest.[2]

I. INTRODUCTION

Most land use regulations are valid exercises of the police power,[3] but government officials occasionally go too far and take private property by regulation.[4] The United States Supreme Court has been unable to define

1. United States v. Pewee Coal Co., 341 U.S. 114, 119 (1951) (Reed, J., concurring).

2. Parks v. City of Boston, 32 Mass. (15 Pick.) 198, 208 (1834).

3. The states have a long-recognized right to guard the health, safety, and general welfare of their citizens. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (recognizing "the historic police powers of the States"). The police power derives from, and is protected by, the Tenth Amendment to the United States Constitution, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. *See generally* James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 7, 60–61 (1992).

Land use matters are inherently local in nature. Therefore, states typically delegate their police power authority over land use matters to counties and cities. *See, e.g.*, Md. Ann. Code art. 66B, § 2.01 (1988) (delegating zoning authority to the city of Baltimore). *See generally* Advisory Comm. on Zoning, U.S. Dep't of Commerce, *A Standard State Zoning Enabling Act* (1926).

4. The Takings Clause states, "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 239 (1897). *But see* Dolan v. City of Tigard, 114 S. Ct. 2309, 2326–27 (1994) (Stevens, J., dissenting) (arguing that the Takings Clause does not apply to the states). If a police power regulation is deemed to go "too far," a court may decide that the government effectively has taken private property by regulation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

The question of how extensively a government body may regulate before it is deemed to have taken property is a controversial and emotional one. Recent cases such as *Dolan*, and recent proposed legislation, *see infra* note 122, suggest that courts and legislatures are moving toward a broader definition of a taking. *See also infra* part III.A. However, there has never been a consensus

with clarity exactly when a regulation amounts to a taking, but has stated unambiguously that a government entity that takes property by regulation must pay just compensation to the owner of that property.[5] This is true even if the regulatory taking was unintentional and even if the regulation subsequently is withdrawn.[6]

The calculation of compensation in any takings case can be extremely difficult. In the more typical physical condemnation case, a government body explicitly takes property in fee and is required to pay the owner the fair market value of her fee simple, determined as of the date of the taking.[7] Compensation disputes frequently turn into battles between opposing appraisers, with the judge forced to determine the appropriate method of valuation and the jury or judge then forced to determine the actual value of the property.[8]

These same issues arise in regulatory takings cases, but often are eclipsed in importance and difficulty by the complex task of determining precisely when the regulatory taking occurred. Unlike physical takings, in which the government either enters onto the property or initiates a condemnation action against the land, regulatory takings may be inadvertent and difficult to recognize when they take place.[9] Years later,

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on this issue among judges, legislators, and legal scholars, and the question shows no signs of approaching any resolution.

5. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) (holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective").

Numerous scholars have examined the difficult question of precisely what constitutes a taking. For leading discussions, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

6. *First English*, 482 U.S. at 315–17, 321.

7. On occasion, the government will take an interest that is less extensive than a fee, such as an easement or a leasehold, and will be required to pay the fair market value of that less extensive interest. *See generally* Roger A. Cunningham et al., *The Law of Property* 507–08, 511–12 (2d ed. 1993).

8. *See infra* note 14 and accompanying text.

9. A taking may be effected either by physical occupation or by regulation. Takings by physical occupation occur when the government enters onto the property, *e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1871) (finding that flooding caused by a state-authorized dam worked a taking), or commences a lawsuit that will give it the right to enter onto the property, *e.g.*, TVA v. Welch, 327 U.S. 546, 551–55 (1946) (acknowledging the power of a government entity to acquire land for a public purpose by condemnation). As a result, physical takings usually are conspicuous. Conversely, regulatory takings result when government officials excessively regulate the use of

after much more regulatory wrangling and litigation have occurred, a court may determine that the municipality's actions effected a taking somewhere along the way.[10] Defining that "somewhere," a point which this Article refers to as the "Effective Moment," is a challenge that surprisingly few courts have faced yet.

The problems do not end there for the finder of fact. Even though a municipality automatically must pay compensation once it takes property by regulation, it is not required to keep the offending regulation in place forever. The government body may decide to abandon or relax the regulation so that it no longer works a taking, thereby transforming the regulatory taking into a temporary regulatory taking and ending the municipality's ongoing liability. In many cases, government abandonment of a regulation will be obvious, as where the municipality expressly repeals the offending ordinance. But in other cases, locating the endpoint of a temporary regulatory taking, a point which this Article refers to as the "Cessation Moment," may present a second challenge to the court.

The Supreme Court has offered little guidance as to when a temporary regulatory taking begins and ends. This is a curious deficiency, given the Court's explicit holding that regulatory takings are compensable and given the Court's increasingly pro-landowner stance.[11] Consistent definitions of the Effective and Cessation Moments are essential to landowners, municipal officials, and attorneys who are assessing the

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property. By their nature, regulatory takings are far more difficult to identify. This Article focuses on regulatory takings but also discusses numerous cases involving physical takings.

Any taking, whether physical or regulatory, may be either direct or inverse. In a direct (or express) condemnation, the government concedes that it is taking property and initiates eminent domain proceedings in accordance with applicable procedures. An inverse condemnation, in contrast, is one that is initiated by a landowner who asserts that the government has taken her property without complying with those procedures. In inverse condemnation cases, the government may dispute whether any taking has occurred at all. Because government entities which regulate the use of property rarely intend to take it, regulatory takings nearly always are inverse takings.

Finally, while most takings are permanent, there is no reason why a government may not take property on a temporary basis. This Article focuses on temporary regulatory takings cases, but much of its analysis is transferable to other types of takings cases.

10. This Article emphasizes temporary regulatory takings arising out of local land use activities, and uses the terms "municipality" and "government" interchangeably. Note, however, that most of this Article's analysis applies equally well to state-level actions and much of it also is applicable to federal activities.

11. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994) (discussing cases protecting First and Fourteenth Amendment rights and observing that the Takings Clause is not a "poor relation"); Ely, *supra* note 3, at 155–56 (predicting that the current Court may strengthen protections for economic and property rights).

risks and benefits of proposed courses of action, and to courts that must calculate compensation awards following municipal missteps.

This Article attempts to pinpoint exactly when the Effective and Cessation Moments occur. Part II examines the small number of clues hidden in Supreme Court case law, with emphasis on the more recent temporary regulatory takings cases. This part extrapolates from these clues, filling in the many gaps in the Court's analysis and offering precise definitions of the Effective and Cessation Moments. The analytical method proposed in part II goes well beyond these definitions, however, and offers a comprehensive model that will enable courts to address many of the related remedial issues that can arise in regulatory takings cases.

A handful of federal and state courts already have been forced to define the Effective and Cessation Moments in specific cases. Part III examines the small number of lower court opinions that have addressed these timing questions in any detail and evaluates the extent to which these cases conform to the model proposed in part II. Although some of these courts selected time points that coincide with those recommended in part II, most of their opinions offer little explanation for their choices. The model proposed here thus supports and justifies the results of some past cases, while affording courts a method of analysis that extends beyond existing case law and that will help them answer the additional questions they are sure to confront in the future.

II. PINPOINTING THE EFFECTIVE AND CESSATION MOMENTS: RECOMMENDATIONS BASED UPON THE SUPREME COURT'S GUIDANCE

If a permanent physical taking resembles a forced sale, then a temporary regulatory taking resembles a forced lease.[12] In a typical

12. *See* United States v. Dow, 357 U.S. 17, 26 (1958) (comparing a temporary physical taking to a lease); Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949) (same); *see also* Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577, 1580 (Fed. Cir. 1990) (approving the lower court's unpublished opinion stating that "the Government's actions in the context of a temporary taking amount to the taking of a leasehold interest for a set period of time," No. 460-80L, slip op. at 4–5 (Cl. Ct. Mar. 9, 1989)); R.J. Widen Co. v. United States, 357 F.2d 988, 996 (Ct. Cl. 1966) (holding that "the United States is obliged to pay plaintiff the fair rental value of that property for the period involved"); 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 579 n.4 (1992) (making a similar statement in dictum); Pewee Coal Co. v. United States, 161 F. Supp. 952, 956 (Ct. Cl. 1958) (noting that in the ordinary temporary takings case, "the proper measure of compensation is the rental that could probably have been obtained for the use of the property during the period involved"), *cert. denied*, 359 U.S. 912 (1959); Anderson v. Chesapeake Ferry Co., 43 S.E.2d 10, 16 (Va. 1947)

physical takings case, the finder of fact must determine the fair market value of the fee as of an easily ascertained date that is entirely within the taker's control. The condemnor either states when the Effective Moment will occur or enters onto the property—events that are readily observable.[13] In a typical regulatory takings case, the finder of fact must determine the fair market value of the leasehold as of a not-so-easily ascertained date that may not be entirely within the taker's control. The fact that the taking is a regulatory taking—and almost certainly inverse—means that its Effective Moment will be more difficult to detect and control, as there will be no physical entry onto the property and no legal document that sets out the Effective Moment. Rather, the government takes the property by overregulating it, and the instant at which regulation transforms itself into overregulation will be more difficult for the municipality to monitor and more difficult for the court to spot.

In addition, the municipality may react to an adverse judgment by withdrawing or modifying the offending regulation in a variety of ways, thereby making the regulatory taking a temporary one. Many of these methods will produce an obvious Cessation Moment, but in some cases, the Cessation Moment may be more ambiguous. As a result of these differences, the burden on the court in a temporary regulatory takings case is far heavier than in the more common permanent physical condemnation case.

Once a court establishes when the Effective and Cessation Moments occurred, it must decide which of several appraisal methods to use in order to place a value on the property interest taken. As a number of courts and commentators have noted, the determination of the best method of calculating compensation is highly dependent on the facts of a given case.[14] In different situations, it may be appropriate for the court to

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(noting that "[a]s just compensation for a permanent taking is fair market value, so just compensation for temporary taking can only be a fair rental value").

13. The Effective Moment is easy to establish even if the physical taking is an inverse taking, because the date of occupation usually is obvious. *See, e.g.*, Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1583 (Fed. Cir. 1993) (holding that the breaking and entering of the owner's warehouse by the Navy began an inverse physical taking).

14. *See* Corrigan v. City of Scottsdale, 720 P.2d 513 (Ariz.) (listing and discussing five possible methods of calculating compensation), *cert. denied*, 479 U.S. 986 (1986), discussed at *infra* notes 198–203 and accompanying text; Patrick J. Rohan & Melvin A. Reskin, 8 *Nichols' The Law of Eminent Domain* § 14E.02 (1995) (discussing various compensation methods); Joseph P. Mikitish, Note, *Measuring Damages for Temporary Regulatory Takings: Against Undue Formalism*, 32 Ariz. L. Rev. 985 (1990) (discussing the five methods set forth in *Corrigan*). While the court and the commentators provide good discussions of various appraisal methods, none focuses on pinpointing the Effective and Cessation Moments.

award the owner the diminution in the value of the property, the option value of the property, the value of a leasehold, tort damages, or some combination of these amounts.[15] The discussion in this Article emphasizes the leasehold approach, as that appears to be the method most commonly used by courts.[16] But no matter which calculation method it chooses to apply, a court that finds a regulatory taking will have to pinpoint its Effective Moment. In addition, if the taking is a temporary one, the court will have to determine its Cessation Moment.

A. The Effective Moment

Pinpointing the Effective Moment of any taking is critically important for a number of distinct reasons. The fact that there is an Effective Moment confirms that there has been a taking—if a court can pinpoint the Effective Moment, it confirms that a taking has occurred.[17] The Effective Moment is the point at which the right to compensation accrues[18] and the statute of limitations on the claim for that compensation begins to run.[19] It is the instant at which fair market value must be ascertained,[20] and it often is the time from which interest must be

15. *See, e.g., infra* notes 198–203 and accompanying text.

16. *See generally infra* part III.

17. *See* Kirby Forest Indus. v. United States, 467 U.S. 1, 11–12 (1984) (noting that in some federal cases it is the act of paying compensation that works the taking); Millison v. Wilzack, 551 A.2d 899, 902 (Md. Ct. Spec. App.) (footnote omitted) (noting that "[i]n inverse condemnation proceedings, whether the property has been taken and what constitutes 'just compensation' are both at issue: to recover 'just compensation' for his property, the property owner must necessarily establish that his property has been taken"), *cert. denied*, 554 A.2d 393 (Md. 1989).

18. *See infra* note 25 and accompanying text. If the taking is a temporary one, the compensation that accrues will reflect the value of the property for only this temporary period.

19. *See, e.g.*, Catawba Indian Tribe v. United States, 982 F.2d 1564, 1570–71 (Fed. Cir.) (holding, in a facial claim, that the tribe's cause of action accrued when the offending act was adopted and that the claim was time-barred as a result), *cert. denied*, 113 S. Ct. 2995 (1993); Norco Constr. Inc. v. King County, 801 F.2d 1143, 1146 (9th Cir. 1986) (Kennedy, J.) (holding that "the same considerations that render a claim premature prevent accrual of a claim for limitations purposes"); United States v. 422,978 Square Feet of Land, 445 F.2d 1180, 1188–89 (9th Cir. 1971) (holding that the statute of limitations expired six years after the government took possession); Creppel v. United States, 30 Fed. Cl. 323, 329–30 (holding that the statute of limitations expired six years after the government issued an order changing the scope of a flood control project), *aff'd in part and rev'd in part*, 41 F.3d 627 (Fed. Cir. 1994). *But see* New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1501–02 (11th Cir.) (Edmondson, J., specially concurring) (suggesting that the statute of limitations may start to run at a later time in some situations), *cert. denied*, 114 S. Ct. 439 (1993).

20. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320 (1987) (noting "the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking"); *Kirby Forest Indus.*, 467 U.S. at 11 (emphasizing that "identification of the time a taking of a tract of land occurs is crucial to determination of the

calculated.[21] The Effective Moment also is the point at which the identity of the owner is established.[22]

This section concludes that if there is a taking, its Effective Moment occurs at the time when the property owner's last required variance application is finally and improperly denied by the highest administrative body with the authority to grant consent. This is a point in the proceedings that fairly balances the interests of property owners, who deserve compensation when a regulation "goes too far," and regulators, who are entitled to a certain amount of time in which to evaluate how far their regulations should go. This alternative creates the proper incentives for future actions by each of the parties. Finally, this definition of the Effective Moment best comports with the limited guidance the Supreme Court has offered. This section will examine the various possible Effective Moments in a land use proceeding, assess the benefits and

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amount of compensation to which the owner is constitutionally entitled"); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 340 (1963) (holding that "entry into possession . . . fixes the date as of which the property is to be valued"); Danforth v. United States, 308 U.S. 271, 283 (1939) (stating that "[t]here is no disagreement in principle. Just compensation is value at the time of the taking."); Jones v. United States, 1 Cl. Ct. 329, 332 (1983) (stating that physical seizure of the property fixes the valuation date).

21. United States v. Dow, 357 U.S. 17, 23–24 (1958); United States v. Creek Nation, 295 U.S. 103, 111–12 (1935); Jacobs v. United States, 290 U.S. 13, 16–17 (1933) (noting that "[t]he amount recoverable was just compensation, not inadequate compensation"); Antoine v. United States, 710 F.2d 477, 480 (8th Cir. 1983) (remanding case for "a closer examination of the prevailing rates of interest over the course of the nearly one hundred years that have followed the taking"); *Jones*, 1 Cl. Ct. at 332; Coeur d'Alene Garbage Serv. v. City of Coeur d'Alene, 759 P.2d 879, 884 (Idaho 1988) (observing that "[o]therwise, the party from whom the property was taken would have been deprived of both the property taken and the use of the just compensation during the period from the taking until the amount of the just compensation for the property taken is determined"); *infra* note 83. *See also Kirby Forest Indus.*, 467 U.S. at 14–19 (denying interest while noting in dictum that interest may be required in other factual settings); Kimball Laundry Co. v. United States, 338 U.S. 1, 21 (1949) (noting that if property is a leasehold and compensation in the form of rent is due, then interest on each installment of rent runs from its due date).

In some cases, interest may have been factored into the award in some other way. In addition, the Court has noted that for practical reasons property often must be valued before the taking occurs, with the result that the date of valuation and the date of taking will not always coincide. To the extent that this practical difficulty causes the owner to receive an amount that is substantially less than the fair market value as of the date of the taking, the award must be modified to reflect the increased value on the taking date. The trial court has considerable discretion to modify the award appropriately, by awarding interest or otherwise. *Kirby Forest Indus.*, 467 U.S. at 16–19.

22. *Dow*, 357 U.S. at 20–21; *Danforth*, 308 U.S. at 284; Georgia-Pacific Corp. v. United States, 568 F.2d 1316, 1319–20 (Ct. Cl.), *cert. denied*, 439 U.S. 820 (1978); Fallini v. United States, 31 Fed. Cl. 53, 57 (1994), *vacated on other grounds*, 56 F.3d 1378 (Fed. Cir. 1995). *But see* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973) (increasing compensation payable to tenant because of strong likelihood that its lease would be renewed).

drawbacks of each, and demonstrate why the alternative proposed here is the most satisfactory one.[23]

1. *The Effective Moment Ordinarily Does Not Occur When the Regulation First Becomes Effective*

At first glance, pinpointing the Effective Moment may appear to be a far easier task than valuing the property as of that date. If a government regulation is so invasive that it constitutes a taking of property, then the taking would seem to begin when the regulation becomes effective. This interpretation is consistent with—though not compelled by—the first clue found in the Supreme Court's case law, Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[24] Justice Brennan concluded that "once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[25] If this holding implies that a regulation "effects a taking" at the instant that the regulation itself becomes effective, then compensation must accrue from the regulation's effective date.[26]

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23. While this Article primarily is concerned with the calculation of temporary regulatory takings compensation, the definition of the Effective Moment proposed here also will serve each of the other functions listed above. *See supra* notes 17–22 and accompanying text.

Note also that this Article focuses on what probably are the most common types of regulatory takings cases, namely claims that arise when an owner wishes to change the use of land. Courts must establish Effective and Cessation Moments in other types of regulatory takings cases as well. *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 716–18 (1987) (finding that a statute that abolished descent and devise of small fractional shares of land effected an uncompensated taking). While the model proposed here may not be directly applicable to all such cases, it will provide guidance even in these less common factual situations.

24. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting). Justices Stewart, Marshall, and Powell joined this dissent, and Justice Rehnquist's unusual concurrence in the case probably constituted a fifth vote in favor of Justice Brennan's position. *Id.* at 633 (Rehnquist, J., concurring). *See* Nemmers v. City of Dubuque, 764 F.2d 502, 505 n.2 (8th Cir. 1985) [hereinafter *Nemmers II*] (finding Justice Brennan's dissent to have "considerable persuasive appeal"); *infra* notes 156–162 and accompanying text.

25. *San Diego Gas*, 450 U.S. at 653 (Brennan, J., dissenting) (footnotes omitted). Although the Court never expressly adopted the *San Diego Gas* dissent, the Court later would state more generally that compensation is required "for the period during which the taking was effective," thereby supporting the thrust of Justice Brennan's conclusion of six years earlier. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

26. The ripeness doctrine ensures that the taking must occur long before the time when the court makes its decision. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 35–40 (1995). Professor Epstein has asserted that "[t]he taking therefore occurs not

Should this definition of the Effective Moment be the correct one, it has some frightening implications for land use regulators, as Justice Stevens noted in a later dissent:

> Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area. . . . It would be the better part of valor [not to ignite] the kind of litigation explosion that this decision will undoubtedly touch off.[27]

The fact that planners may become more cautious, litigation may increase, and municipalities may lose more often and more grandly does not necessarily imply that this is an improper approach, and there certainly are many property owners and lawyers who would applaud such a transformation. But the view that the Effective Moment must occur at the instant the offending regulation becomes effective is an overstatement of the precedent and is ill-advised as a matter of policy. These two events *can* occur simultaneously,[28] but there is no reason why they *must*.[29]

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at the time of the final judicial determination, but at the earlier moment when the regulation was first placed into effect." Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 28. The fact that the taking must occur before the court decides does not, however, prove Professor Epstein's more sweeping assertion that the taking must occur when the regulation first becomes effective. *See also* Robert C. Ellickson & A. Dan Tarlock, *Land-Use Controls* 169–72 (1981) (discussing the chronology of significant events in a regulatory takings case); Gregory S. Alexander, *Takings, Narratives, and Power*, 88 Colum. L. Rev. 1752, 1756–60 (1988) (discussing alternative definitions of the Effective Moment).

27. *First English*, 482 U.S. at 340–41 (Stevens, J., dissenting) (citations omitted). Justice Stevens, like his colleagues, failed to define the Effective Moment. But if the definition discussed in part II.A.1 of this Article turns out to be the correct one, then the severe consequences that Justice Stevens predicted would be maximized. These effects will extend well beyond the confined facts presented in the cases the Court faced. A land use regulation covering hundreds of parcels that has been in effect for many years could lead to staggering liability.

28. In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), the Court assumed that the landowner began to suffer injury on the date the ordinance became effective. *Compare id.* at 2889 (observing that "[t]he Beachfront Management Act brought Lucas's plans to an abrupt end") *with id.* at 2917 (Stevens, J., dissenting) (noting that "the record does not tell us whether his building plans were even temporarily frustrated by the *enactment* of the statute") (footnote omitted) (emphasis added).

29. The argument that the Effective Moment occurs when the regulation becomes effective is more convincing in a facial challenge, in which the landowner argues that the existence of the regulation, not its application, takes private property. Agins v. City of Tiburon, 447 U.S. 255, 259 (1980). *See also* Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 688 (9th Cir. 1993) (holding that a facial taking occurs, and the statute of limitations begins to run, when the land use regulation is enacted), *cert. denied*, 114 S. Ct. 924 (1994); Catawba Indian Tribe v. United States, 982 F.2d 1564, 1570–71 (Fed. Cir.) (finding facial takings claim time-barred on these grounds), *cert. denied*, 113 S.

The only Supreme Court case law justification for such a rule is the equivocal language found in *First English Evangelical Lutheran Church v. County of Los Angeles*[30] and in Justice Brennan's *San Diego Gas* dissent.[31] Clues in other Supreme Court cases suggest just the opposite result. In *Williamson County Regional Planning Commission v. Hamilton Bank*,[32] the Court discussed the question of "how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession."[33] In other words, the Court was asking when during the pendency of a land use regulation the Effective Moment occurs. Although the Court failed to resolve that issue, it did appreciate that answering the question requires an understanding of how the regulatory body will apply its regulations to the land.[34] "That effect cannot be measured until a final decision is made as to how the regulations will be applied to [the owner's] property."[35]

Ct. 2995 (1993); Scott v. City of Sioux City, 432 N.W.2d 144, 148 (Iowa 1988) (same). Even here, however, it is possible that treating the effective date of the regulation as the Effective Moment will create windfalls for some landowners. For example, what if the landowner had not been using the property at the time that the ordinance became effective? What if she had purchased the property at about the time the ordinance became effective, and the purchase price reflected the diminished property value caused by the ordinance?

But even if the date on which the regulation becomes effective is an appropriate Effective Moment in a facial claim, it would not be in most as-applied claims. An as-applied claim, by definition, is one in which the application of the regulation to the land, and not merely the existence of the regulation, works the taking. If the existence of the regulation predates the taking, then the effective date of the regulation should not be the Effective Moment.

30. 482 U.S. at 321. *See supra* note 25.

31. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 (1982) (Brennan, J., dissenting). *See supra* notes 24–29 and accompanying text. Although Justice Brennan states that compensation should be due from the time the regulation "first effected the taking," he also observes that "it is only fair that the public bear the cost of benefits received during the interim period between *application* of the regulation and the government entity's rescission of it." *San Diego Gas*, 450 U.S. at 653, 656–57 (Brennan, J., dissenting) (emphasis added). Thus, his opinion simply may imply that a regulation does not effect a taking until it is applied in a way that harms a landowner constitutionally.

32. 473 U.S. 172 (1985).

33. *Id.* at 199.

34. *Id.* at 199–200.

35. *Id.* at 200. *See also* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 (1986) (noting that "no answer [to the takings question] is possible until a court knows what use, if any, may be made of the affected property"); Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 380 n.3 (9th Cir.) (observing that "[a]pplication of the ordinance does not occur until the City rules on a request for a variance or a special use permit under the ordinance"), *cert. denied*, 488 U.S. 851 (1988); John Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication*, 20 Urb. Law. 675, 693–94 (1988) (proposing that the term "denial of development permission" be defined broadly).

Years earlier, in *Danforth v. United States*,[36] the Court held that "[t]he mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail."[37] Legislation authorizing an express physical condemnation, such as that examined in *Danforth*, gives the government the power to condemn property explicitly by initiating some additional action. Similarly, the enactment of a strict regulation of land use, such as that in *First English*, may give the government the power to effect an inverse regulatory taking by denying a permit or a variance request.[38] In the direct condemnation case, the government, but not the landowner, may elect to effect a condemnation by precipitating this final action. The government, in other words, is in complete control. In the inverse condemnation case, however, the landowner may provoke the final step by deciding to change the use of her land.[39] In either case, the regulator creates an environment in which a taking may occur if something else happens, but in an inverse condemnation case, that

36. 308 U.S. 271 (1930).

37. *Id.* at 286 (footnote omitted). *See also* Creek Nation v. United States, 302 U.S. 620, 622 (1938) (noting that "[t]he act of 1891 did not dispose of the lands. Its erroneous application . . . constituted the taking by the United States."); 23 Tracts of Land v. United States, 177 F.2d 967, 969–70 (6th Cir. 1949) (observing that the enactment of legislation that authorizes a taking is not itself a taking).

Moreover, when the condemnor is the United States, even completion of formal condemnation proceedings does not effect a taking, because the government may choose not to buy the land after it learns what the land will cost. "The practical effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price." Kirby Forest Indus. v. United States, 467 U.S. 1, 4 (1984) (citing *Danforth*, 308 U.S. at 284).

Conversely, an unauthorized physical occupation may effect a taking before condemnation proceedings are ever initiated. *See, e.g.*, Shoshone Tribe v. United States, 299 U.S. 476, 493 (1937) (noting that the wrongful act occurred long before the tribe made its claim).

38. Land use regulations typically set forth procedures for securing permits and variances, and "the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985). The requirement that an owner apply for such a permit is not itself a taking. *Id.* As a result, the effective date of the challenged regulation should be irrelevant in most as-applied takings claims.

39. *Kirby Forest Indus.*, 467 U.S. at 16 (noting that "petitioner had the option, at any time, to precipitate an immediate taking of the land and to obtain compensation therefor as of that date, merely by informing the Government of its intention to cut down the trees"). *See also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 847–48 (1987) (Brennan, J., dissenting) (noting that it is the landowner who wishes to develop land who disturbs the status quo).

External conditions, ranging from business cycle fluctuations to natural disasters, also may cause this final step to occur. *See* United States v. Dickinson, 331 U.S. 745, 747–48 (1947) (observing, in a case involving gradually increasing flooding following the construction of a dam, that "[t]he Government could . . . have taken appropriate proceedings, to . . . have fixed the time when the property was 'taken.' The Government chose not to do so. It left the taking to physical events . . . .").

"something else" may not be exclusively within the government's control.[40] In each case, however, it is the final step that works the taking, and compensation should not accrue before that final step occurs.[41] The Fifth Amendment, after all, does not require compensation for thinking about taking private property.

Moreover, from a practical standpoint, a facially neutral regulation can have vastly disparate effects upon different landowners, depending upon the specific parcels and the ways in which their owners are using them. A land use regulation may exist for a period of time, only to become a taking as applied to a particular property owner after that owner changes her plans for her land, after the municipality enforces the regulation against the landowner, or after external conditions change.[42] If an existing regulation does not harm a given owner until she wishes to sell, develop, or refinance her land years later, there is no constitutional or prudential reason for a court that later finds a taking to order compensation for those earlier years. If the Court's ambiguous language is seen as always requiring the Effective Moment to occur at the time a land use regulation becomes effective, then some landowners may be compensated for something they never lost.[43] In the most extreme case, a

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40. *See* United States v. Clarke, 445 U.S. 253, 257–58 (1980) (noting the heavier burden of initiative facing landowners in inverse condemnation suits); *see also* Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir. Unit A May 1981) (recognizing that a general zoning ordinance may exist harmlessly for a period of time before other circumstances change to the landowner's detriment), *cert. denied*, 455 U.S. 907 (1982).

41. The government actually may seem *less* culpable in inverse regulatory takings cases, in which a private party may catalyze the taking or some external event can change circumstances. In express condemnation cases, only the government can take the final step.

42. If the mere existence of the regulation has no material impact upon the owner's actual plans for the property or actual ability to use the property, then the owner cannot reasonably argue that she deserves compensation for the entire interval since the regulation's effective date. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 327–28 (1987) (Stevens, J., dissenting) (observing that "[i]n light of the tragic flood and the loss of life that precipitated the safety regulations here, it is hard to understand how appellant ever expected to rebuild on Lutherglen"). Even if that date somehow were the Effective Moment, just compensation would be nominal.

If the emergency ordinance at issue in *First English* had remained in effect after the flood danger abated, then the church would have presented a more compelling case. But even so, a court finding a taking should have awarded compensation only from the time the flood danger subsided.

See generally Susan Webber Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark. L. Rev. 612, 639–41 (1984) (recognizing the potential unfairness of always awarding compensation from the time a regulation becomes effective).

43. See Cornish Town v. Koller, 817 P.2d 305 (Utah 1991), for an example of a court that avoided falling into this trap. The court noted that "[d]espite Kollers' argument, ordinance 81-1 and the succeeding ordinances had little, if any, effect on Kollers until the service of summons [nearly five years later]" and held that compensation did not begin to accrue at the time the land use

landowner entirely unaware of the existence of the regulation might nonetheless be entitled to compensation. There is no reason why the government should have to pay for not taking something a landowner did not lose.[44]

2. *The Effective Moment Ordinarily Does Not Occur at the Time of the First Permit Application*

A court which concludes that the Effective Moment does not occur when the challenged regulation becomes effective still must ascertain exactly when the Effective Moment does occur. One possibility is to establish the Effective Moment as the point when the landowner first applies for a building permit.[45] This option weeds out claims by landowners whose current use of their property is not yet affected by the new land use ordinance. A landowner who has not applied for a building permit will be deemed to have no current, crystallized development plans for her property and, therefore, no constitutional loss, at least not yet. The just compensation meter will begin to run for her, if it ever does so, at that later point when she applies for a building permit.

This approach, however, misguidedly places those landowners who are denied permits in a better position than those who receive permits at the end of a prolonged process. The Court has distinguished improper

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ordinance first became effective. *Id.* at 311. Most regulatory takings plaintiffs lose, but application of the rule criticized here would cause some of the few winning plaintiffs to be overcompensated.

See also Norman Williams, Jr., et al., *The White River Junction Manifesto*, 9 Vt. L. Rev. 193, 223 (1984) (noting that the approach criticized in part II.A.1 of this Article would allow owners to "sandbag the municipality by waiting to challenge the zoning restrictions until their temporary taking damages have become impressively large"); J. Margaret Tretbar, Comment, *Calculating Compensation for Temporary Regulatory Takings*, 42 Kan. L. Rev. 201, 214 (1993) (arguing that landowners should not be rewarded for lack of diligence).

44. Designating the effective date of the regulation as the Effective Moment also can cause unexpected problems for owners who choose to hold their land undeveloped. They may find themselves barred by statutes of limitations that expire before their development plans crystallize. *See infra* notes 52–53 and accompanying text.

45. This Article uses the term "building permit" somewhat generically, as a surrogate for whatever municipal consent the landowner needs and the regulatory authority has the power to deny. The so-called building permit actually may take the form of an authorization to raze a landmarked structure, or dredge and fill wetlands, or subdivide a large lot, but the takings analysis in each of these cases will be similar. In addition, regulatory schemes may vary from zoning resolutions to limitations on surface mining, but the takings analysis should be comparable under all of these land use restrictions.

permit denials from ordinary regulatory delays,[46] with one Justice noting that normal delays simply are the "inevitable cost[s] of doing business in a highly regulated society."[47] But if the Effective Moment occurs when a permit application is filed, then the owner whose application is improperly denied will be entitled to compensation for the duration of the permitting process—including all normal delays and deliberations and all appeals and variance applications—and not just for the time after the denial of the permit. A neighbor, who endures a similarly prolonged process but ultimately *receives* a permit, is entitled to nothing else, because normal delays are just another development cost[48] and there will have been no taking. An owner whose permit is improperly denied should be compensated for the improper denial but not for the prior normal delays that all applicants face. The government must pay for reaching the wrong result but not for employing a legitimate process to reach that result.[49]

A second problem with this approach is that it may encourage landowners to apply for building permits prematurely in order to preserve the possibility of later bringing takings claims that seek the largest possible awards. An owner might be willing to go to the expense of pursuing a permit if she knows that this is the only way to cause her property rights to vest and to start the compensation meter running on a claim that she may wish to bring in the future.[50] Without this application,

46. *First English*, 482 U.S. at 321. While the Court did not explicitly state that normal delays are non-compensable, it did call them "quite different" from the allegations in the landowner's complaint, which would have been compensable if proved. *Id.*

47. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 204 (1985) (Stevens, J., concurring).

48. *See id.* at 205 (Stevens, J., concurring) (noting that "if the procedure that has been employed to determine whether a particular regulation 'goes too far' is fair, I know of nothing in the Constitution that entitles [the owner] to recover for this type of temporary harm"); 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 581 (1992) (observing that "[w]hat Atlantic now alleges was a temporary taking was the period for governmental decision making permitted by statute.... [T]he Government cannot be charged with the delay necessary to complete the review process.").

49. If the government fails to employ a legitimate process, then the landowner may have been denied procedural or substantive due process or equal protection of the laws. Damages are available for such denials under 42 U.S.C. § 1983 (1988). *See generally* Stein, *supra* note 26, at 66–71.

50. In a slightly different context, one court noted the importance of not deeming property rights to be vested too early in the permitting process. "[C]haos would occur.... [P]eople would rush to city hall to file applications and preserve their right to proceed." Mandel v. City of Santa Fe, 894 P.2d 1041, 1043 (N.M. Ct. App. 1995).

she loses the chance to recover for the early months or years of lost "value" that she never planned to realize in the first place.[51]

A mechanistic building permit requirement also might disqualify some deserving plaintiffs. Owners who hold land for future development may suffer actual losses even though they have no immediate construction plans and no reason to seek a permit. These losses will, on rare occasions, amount to takings.[52] Events such as zoning changes may impair an owner's ability to grant an option, to obtain a loan secured by a mortgage, or to lease the property, even though the owner plans to continue the present use of the land and has no immediate need for a building permit. Every parcel of property that is not developed to the greatest possible extent represents unused economic value, and it might be unfair in some circumstances to require a landowner to apply for an unwanted, and perhaps unobtainable, building permit before a compensation award for the overregulation of that parcel can begin to accrue. Of course, in most cases, such deprivations are not constitutionally remediable. But in the rare case in which municipal actions do amount to a taking, a permit requirement might unfairly disadvantage a deserving landowner.[53]

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51. In essence, the government might end up paying a landowner not to build unneeded space that she was not planning to build anyway. This not-built-but-paid-for space is reminiscent of the alfalfa not grown by Major Major's father:

> His specialty was alfalfa, and he made a good thing out of not growing any. The government paid him well for every bushel of alfalfa he did not grow. The more alfalfa he did not grow, the more money the government gave him, and he spent every penny he didn't earn on new land to increase the amount of alfalfa he did not produce. Major Major's father worked without rest at not growing alfalfa. On long winter evenings he remained indoors and did not mend harness, and he sprang out of bed at the crack of noon every day just to make certain that the chores would not be done. He invested in land wisely and soon was not growing more alfalfa than any other man in the county.

Joseph Heller, *Catch-22* 85–86 (Dell Publishing Co. 1961).

52. *See generally* William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. (forthcoming 1995) (manuscript at 86–88, on file with the *Washington Law Review*) (discussing the problems facing investors who do not wish to develop their land themselves but who wish to sell to people who do); Stein, *supra* note 26, at 41 & n.154 (same); Terry D. Morgan, *Exhaustion of Administrative Remedies as a Municipal Defense to Inverse Condemnation Actions* in *1984 Institute on Planning, Zoning, and Eminent Domain* 9-1, 9-32 to 9-34 (Janice R. Moss ed., 1985) (discussing owners who hold property for future development). The property owner in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), might have fallen into this category, if the dissenters had been able to convince their colleagues that he did not plan to develop his land as early as he claimed. In fact, the *Lucas* dissenters also argued that this absence of a development plan vitiated his takings claim entirely. *Id.* at 2907 (Blackmun, J., dissenting); *id.* at 2917 & n.1 (Stevens, J., dissenting). *See also id.* at 2902 (Kennedy, J., concurring in the judgment).

53. The fact that the owner has not applied for a building permit will, however, greatly reduce the likelihood that a court will find a taking to have occurred, even putting aside the ripeness problems

Defining the Effective Moment as the permit application date might weed out some frivolous claims from landowners who have no development plans and who suffer no immediate economic losses, and it would provide some guidance in an uncharted area of takings law. But this definition also will place some landowners whose property is taken in a better position than those who suffer long delays but no takings. In addition, this definition might encourage claims by landowners who seek to inflate their compensation awards by applying for building permits prematurely, and it might unfairly penalize some deserving landowners who do not yet have concrete plans. These problems may turn out to be minor, and astute judges should be able to distinguish legitimate claims from specious ones. However, an alternative definition of the Effective Moment comports with precedent, causes no unreasonable hardship to landowners or to regulators, and constitutes wiser land use policy. Under this view, a regulation might exist harmlessly for a period of time; compensation will accrue only from the time that the regulation combines with subsequent events to effect a taking as applied to a given landowner.[54]

3. *The Effective Moment Presumptively Occurs When the Municipality Finally Denies the Permit Application and All Required Variance Requests*

Courts should presumptively define the Effective Moment as the point at which the landowner's last required variance application is finally and improperly denied by the highest administrative body with the power to consent.[55] The Court long has recognized that a regulation that goes too far can take property,[56] but a court cannot evaluate whether a regulation

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such a claim would present under current law. A building permit application might serve as many as three different functions in a regulatory takings case: it helps to ripen the claim; it increases the likelihood that a court will find a taking; and it might mark the beginning of the time span for which compensation must be paid. This Article focuses on only the third of these functions, but all three are important in an actual takings case.

54. "A claim first accrues when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action." Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States, 373 F.2d 356, 358 (Ct. Cl.) (citing 28 U.S.C. § 2501), *cert. denied*, 389 U.S. 971 (1967).

55. *See* Robert H. Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urb. Law. 447, 473–77, 481–82 (1983) (defining the Effective Moment in a similar fashion, but arguing, in a pre-*First English* article, that regulatory takings should not be compensable).

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

goes too far before it knows how far the regulation goes.[57] If a municipal regulatory body still might consent, then the owner may receive the permit she desires and may never suffer a taking. At this intermediate point in the permitting process, the owner has not suffered a taking yet, cannot know whether she ever will suffer a taking, and cannot prove any constitutionally compensable loss. Any taking that ultimately may result will not become effective until the municipality turns down the application for good—this is when the taking actually *occurs*.[58] The Effective Moment recommended here is the point at which any municipal error that may have transpired becomes constitutionally irreversible. For the first time, the court knows the municipality's final position and can decide whether that position is legally infirm.

An application for a permit, by itself, does not give a clear indication of the landowner's final position. Owners often amend their plans while negotiating with regulatory agencies,[59] and an initial permit application represents only the owner's initial, perhaps utopian, position. Conversely, a denial by a zoning board does not give a clear indication of the municipality's final position, because an appellate administrative body may reverse or modify this decision or may authorize a special exception or a variance. Not until the last required variance application is finally denied do the parties irrevocably state their final positions.[60] A federal court at last knows that the least intensive development the landowner will accept is more excessive than the most intensive development the municipality will allow, and can decide whether the municipality's application of its regulation goes too far.

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57. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348–49 (1986).

58. *See, e.g.*, Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994). The Federal Circuit observed that "property owners cannot sue for a temporary taking until the regulatory process that began it has ended. This is because they would not know the extent of their damages until the Government completes the 'temporary' taking. Only then may property owners seek compensation." In a later portion of the opinion, focusing on a subsequent permanent taking, the court again pointed out that "[t]he EPA's Final Determination 'fixed the liability' of the Government. . . . On this date, the EPA finally fully vetoed the original Project . . . ." *Id.* at 634.

59. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 176–82 (1985) (discussing in detail the negotiations between the developer and the planning commission).

60. A variance application is "required," as the term is used here, if it is necessary under applicable law to ascertain the administrative body's final position on the permit application. *See id.* at 186–94. This standard is the same one the Court has used in determining whether a landowner has met the first portion of the two-part ripeness test set forth in *Williamson County*. *Id.* This definition excludes activities that occur after the municipality reaches its final decision, such as attempts to obtain rezoning of the property and pursuit of litigation in state court seeking just compensation.

Prior to the Effective Moment proposed here, a landowner is pursuing the normal procedures that all applicants must follow prior to commencing construction. The first opinion to state expressly that regulatory takings were compensable, *First English*, made this point explicitly, when it distinguished regulatory takings from "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[61] When the municipality reaches a final decision, these normal delays end and the owner's constitutional injury, if there is one, begins. As the Court had stated earlier, "Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."[62]

This definition of the Effective Moment finds other support in the Supreme Court's regulatory takings case law. In discussing whether regulatory activity might amount to a taking, the *Williamson County* Court noted that "among the factors of particular significance . . . are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations."[63] In rejecting the property owner's case on ripeness grounds, that Court concluded that "[t]hose factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[64] This definition of the Effective Moment thus dovetails with the Court's ripeness standards. The allegation that the Effective Moment has occurred constitutes the prerequisite to a suit for compensation in state court, and the failure of that state court suit constitutes the final step necessary to ripen a federal takings claim.[65]

The Effective Moment advocated here also is the first point that is late enough in the permitting process to avoid the strategic problems

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61. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987). *See* Michelman, *supra* note 5, at 1213 (noting that even some measures that redistribute wealth capriciously nonetheless are non-compensable); *supra* notes 46–49 and accompanying text.

62. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985). The *Riverside Bayview* Court had no occasion to distinguish between denials of initial permit applications and final denial of the last required variance application. However, the context of the Court's discussion suggests that it was speaking of final denials, after the landowner had pursued all available administrative options. *Id.* at 126–29.

63. *Williamson County*, 473 U.S. at 191.

64. *Id. See also id.* at 193 (observing that "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").

65. *Id.* at 186–96; Stein, *supra* note 26, at 21–22.

discussed above, in that it will not encourage landowners to apply for permits they do not need or want, and will not favor some applicants over other similarly situated ones.[66] In particular, the definition urged here might accommodate some of the concerns of Justice Stevens, who dissented from *First English*.[67] Justice Stevens had remarked in an earlier opinion that "if the procedure that has been employed to determine whether a particular regulation 'goes too far' is fair, I know of nothing in the Constitution that entitles [the landowner] to recover for this type of temporary harm."[68] *First English* held that temporary regulatory takings are compensable, while Justice Stevens consistently has voiced his concern that the owner not receive compensation for the temporary harm suffered during a fair and reasonable process of deciding. The definition of the Effective Moment proposed here meets the compensation requirement of *First English* while addressing Justice Stevens's well-founded apprehension, by ensuring that compensation accrues only after the decisionmaking process concludes.

If the least intensive development that the landowner seeks is "grandiose," a federal court may dismiss any resulting takings claim as unripe.[69] This amounts to a judicial statement that the developer's expectations to date have been unrealistic. In such a case, the landowner must return with a more modest proposal, and the denial of the final variance application for this scaled-down version of the project would serve as the Effective Moment of any taking. The landowner would not be entitled to compensation for the prior period, during which it made unreasonable demands and was properly rejected. Landowners have no constitutional right to be compensated for temporary over-optimism.

Just as landowners may err during the permitting process by being unreasonably optimistic, regulators may err by being arbitrary or by delaying action on the application for an unreasonable period. If the municipality's procedures are inadequate, the owner may have a claim arising out of those procedures. This claim ordinarily will not be

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66. *See supra* notes 46–51 and accompanying text. By reducing these strategic problems, this definition also reduces the number of claims that might otherwise arise, thereby keeping transaction costs low. *See* Michelman, *supra* note 5, at 1222 (recognizing that some possible resolutions of the compensation issue have prohibitively high settlement costs).

67. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987) (Stevens, J., dissenting). *See supra* note 27 and accompanying text; *supra* note 42 and accompanying text.

68. *Williamson County*, 473 U.S. at 205 (Stevens, J., dissenting).

69. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353 n.9 (1986) (noting that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews").

grounded in the Takings Clause, however, for nothing will have been taken. Inadequate procedures may give rise to claims under the Due Process Clause or the Equal Protection Clause[70]—in fact, this is true even if the permit or variance is granted. But until the municipality decides, the landowner simply is suffering through the administrative process—a process that is inherently slow—and the Court recognizes that the Takings Clause grants local decisionmakers a reasonable amount of time in which to decide. The landowner may suffer losses before the municipality reaches its decision, but even in the rare case in which those losses are remediable, they should not be remediable under the Takings Clause.[71]

4. *Rebutting the Presumptive Effective Moment*

A landowner should retain the ability to rebut the presumptive Effective Moment proposed here. Such a rebuttal would be appropriate, for example, in a case in which the municipality makes an early, informal decision to reject a permit and then uses the permitting process as a means to delay reaching that result officially. The presumption that the Effective Moment occurs at the time of the final variance denial might even increase the likelihood of municipal delay by postponing the accrual of liability until a date that the municipality controls and can defer improperly. Sophisticated government bodies would have an additional incentive to avoid reaching a final determination since the reaching of that decision also would serve to start the compensation meter running.

In cases such as these, a federal court would retain the ability to define the Effective Moment as the date when the municipal body informally reached its final decision, a date that presumably would occur long before the formal decision date. If the landowner could show that some segment of the application process was a pretense and that continued pursuit of the permit application beyond a given point would have been futile,[72] then she would be showing the court the date on which the request truly was denied and would be increasing her compensation

70. U.S. Const. amend. XIV, § 1.

71. *See* Stein, *supra* note 26, at 66–71.

72. "Under [the futility] exception, the requirement of the submission of a development plan is excused if such an application would be an 'idle and futile act.'" Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454 (9th Cir. 1987) (citing Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1146 n.2 (9th Cir. 1983)). *See also MacDonald, Sommer & Frates*, 477 U.S. at 359 (White, J., dissenting) (noting that "a landowner . . . need not, I believe, take patently fruitless measures").

accordingly. Referring to this approach as "rebutting the presumptive Effective Moment" actually is somewhat inaccurate on the hypothetical facts offered here. In essence, the court would be employing the proposed definition of the Effective Moment, but in a more conscientious way, so as to accord with the reality of what happened at the local level. Similarly, in physical occupation cases in which the United States is the condemnor, the Court has recognized that if the occupation predates commencement of eminent domain proceedings then the Effective Moment occurs as of the occupation date.[73]

5. *The Effective Moment Should Not Be Defined on an Ad Hoc Basis*

Once a court recognizes that the Effective Moment can be rebutted, it may question why it ever tried to define a uniform Effective Moment at all. If the goal of *First English* is to award compensation from the instant a landowner suffers constitutional loss, then why establish a standard definition of the Effective Moment for all cases, a point that may hold no significance to certain plaintiffs? Courts instead might adopt an ad hoc approach, mirroring the technique that federal courts already employ in answering the substantive question of whether a taking has occurred at all. This parallel seems appropriate, for if the substantive question of whether a taking has occurred typically can be answered only on a case-by-case basis, then the question of *when* that taking became effective should be amenable to no more systematic answer.[74] The primary benefit of this method is that it is flexible enough to account for the wide variety of facts and procedures that may present themselves in takings claims.[75]

Applying this technique in all takings cases would cause difficulties, however. Most obviously, the ad hoc approach is highly subjective and extremely labor intensive. Courts would be forced to go through the slow, costly process of determining the Effective Moment based on the

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73. United States v. Dow, 357 U.S. 17, 21–22 (1958).

74. *See* United States v. 15.65 Acres of Land, 689 F.2d 1329, 1334 (9th Cir. 1982) (employing the analysis typically used to determine whether a taking has occurred to the question of when it occurred), *cert. denied*, 460 U.S. 1041 (1983); *see also* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 482–83 (1973) (Rehnquist, J., dissenting) (noting that the question of what is taken and the question of its value cannot easily be separated); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393, 1405 (1991) (arguing that the question of what constitutes a taking and the question of how much compensation is required are actually different versions of the same inquiry).

75. *See, e.g.*, United States v. Dickinson, 331 U.S. 745, 749 (1947) (noting, in a case involving gradually increasing flooding following the construction of a dam, that "[w]hen dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided").

unique facts of each individual case; prior cases would offer little guidance and any given case would be of little precedential use to future courts. Individualized treatment would lead to inconsistent results, thereby causing even greater forecasting problems for planners and property owners than those that will arise under the more standardized definition recommended here.[76] Courts may not be willing to sacrifice judicial efficiency to such a great extent, particularly since the presumptive Effective Moment will prove to be the actual Effective Moment in the large majority of cases.[77]

A related problem with the ad hoc approach is that the impact of a land use regulation upon a landowner often is gradual and cumulative. A press report published in January may lead to a slow and erratic diminution in value beginning in April; by the time of an October city council meeting the property may have depreciated substantially. If a court later determines that a taking occurred, it will find it extraordinarily difficult to determine precisely *when* during that time span the taking became effective.[78] If any attempt to define the Effective Moment is destined to incorporate some arbitrariness, courts at least should strive for a definition that is predictable, that is fair in most cases, and that is rebuttable in the remaining few.

In addition, if courts adopt an ad hoc approach, landowners are more likely to argue that they are entitled to compensation for events that current doctrine properly treats as pre-condemnation activities and thus non-compensable.[79] Courts view these impairments as too distant and tenuous to qualify as constitutional injuries and as extraordinarily

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76. "[Determining] when a taking has occurred *or will occur*... is no easy task, but it is simplicity itself compared to peering into the swirling mists of the crystal ball to predict when a contemplated action will subsequently result in a 'taking.'" Williams, *supra* note 43, at 219. *See also* Kirby Forest Indus. v. United States, 467 U.S. 1, 17 (1984) (noting that "prediction of the value of land at a future time is notoriously difficult").

77. For example, in a slightly different context also concerning valuation, the Court conceded, "We are willing to tolerate such occasional inequity because of the difficulty of assessing the value an individual places upon a particular piece of property and because of the need for a clear, easily administrable rule governing the measure of 'just compensation.'" *Kirby Forest Indus.*, 467 U.S. at 10 n.15 (citations omitted). *See also* Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949) (noting that "loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it... is properly treated as part of the burden of common citizenship").

78. Courts have found it tremendously difficult to determine how far is "too far." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). For many of the same reasons, they also will have difficulty deciding *when* a regulation goes too far.

79. *See supra* notes 46–49 and accompanying text for a discussion of these pre-condemnation activities and why they ordinarily should not be compensable.

difficult to quantify.[80] An ad hoc rule would encourage landowners to argue for an overly expansive definition of a taking, an argument that will increase litigation costs still further and that is sure, at some point, to lead to some unfair outcomes.[81] While defining the Effective Moment on an ad hoc basis might seem appealing initially, this approach would prove difficult to implement.[82]

In summary, courts should define the Effective Moment as the point at which the landowner's last required variance application is finally and improperly denied by the highest administrative body with the power to grant it.[83] This standard allows regulators a reasonable amount of time in

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80. *See, e.g.*, *Kirby Forest Indus.*, 467 U.S. at 15 (noting that, even after the *initiation* of condemnation proceedings, "impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking.... [E]ven a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment."); Danforth v. United States, 308 U.S. 271, 285 (1939) (observing that "[a] reduction or increase in the value of a property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.").

If a municipality intentionally takes pre-condemnation actions designed to lower the cost of the anticipated taking, there is a remote chance that it might be found liable for this orchestrated depreciation on a "condemnation blight" theory. *See, e.g.*, Klopping v. City of Whittier, 500 P.2d 1345, 1350 (Cal. 1972) (recognizing this argument in dictum).

81. The Court long has recognized that both sides in takings cases are prone to engage in such "manipulations." United States v. Dow, 357 U.S. 17, 25 (1958). This problem can arise under any of the proposed definitions of the Effective Moment examined in this section. However, an ad hoc approach, by its nature, will maximize the incentives for parties to act in this fashion.

82. One last possibility is to define the Effective Moment as the date when a state tribunal finally denies compensation. But this point, which must occur after the Effective Moment proposed in this Article, turns out to be too late in the process. If a federal court finds that there has been an uncompensated taking, then, by definition, the state's failure to award compensation was improper. And if the state's failure to award compensation was improper, then the taking must have occurred before the state arbiter rejected the claim. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985) (noting that "the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking"); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 463–64 (7th Cir. 1988) (noting that a taking must become effective before a federal takings claim ripens); Stein, *supra* note 26, at 36–40 (demonstrating that the Effective Moment must occur before a federal takings claim ripens).

83. There are several other reasons why pinpointing the Effective Moment is so important and why cases on this issue are sure to arise, as already noted. *See generally supra* notes 17–23 and accompanying text. To start with, the existence of the Effective Moment confirms that there has been a taking. The Effective Moment also is the point at which the statute of limitations on the initial claim for compensation begins to run, the point at which the fair market value of the property is determined, and the point at which the owner of the property interest in issue is determined. Finally, the condemnor, even if it is the United States, is required to pay interest from the time of the taking if the taking precedes payment. Since the taking always will precede payment in an inverse regulatory takings case, the Effective Moment is of particular importance in such cases for the purpose of calculating interest.

which to decide how to apply their regulations, and will cause municipal authorities to review their procedures carefully before reaching a final decision. It reminds landowners that municipal decisions take time and that normal delay is one of the costs of changing the use of real estate. This point is late enough in the process that it will discourage inappropriate strategic behavior by landowners. Conversely, the fact that this definition is rebuttable will discourage similar manipulations by regulators and will leave courts with a degree of flexibility in those cases in which it is most essential. Finally, landowners will retain the ability to attack procedures they believe to be inadequate by bringing a claim under the Due Process Clause, and to challenge conduct they view as arbitrary or discriminatory by initiating an action under that clause or the Equal Protection Clause.[84]

B. The Cessation Moment

A regulatory taking may last forever, but it does not have to.[85] "Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain."[86] Whichever option the municipality selects, it still must compensate the owner for the period commencing with the Effective Moment and continuing through the point at which it amends or withdraws the regulation or exercises its eminent domain power. This Article defines that endpoint as the Cessation Moment.

The condemning entity should not be able to avoid the interest component of a takings award in a regulatory takings case. Depending upon the appraisal method, post-taking interest may already be factored into the award and may not need to be calculated separately. However, courts must be cognizant of this component of the award, whatever the calculation method, as counsel for the property owner is likely to point out. *See* United States v. 156.81 Acres of Land, 671 F.2d 336, 339 (9th Cir.) (observing that "[w]here taking precedes payment, the condemnor must compensate the landowner for the loss of use of either the property or money between the taking and payment"), *cert. denied*, 459 U.S. 1086 (1982).

84. U.S. Const. amend. XIV, § 1. *See generally* Eide v. Sarasota County, 908 F.2d 716, 720–22 (11th Cir. 1990) (discussing four different types of claims available to landowners under the Takings, Due Process, and Equal Protection Clauses); Stein, *supra* note 26, at 66–71 (discussing the differences among these three constitutional provisions).

85. *See* Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (noting that "a regulatory taking, unlike a physical taking, is by its nature 'temporary.' This is because the government, upon being told the regulation was overly intrusive and therefore a taking (by whatever test), could rescind or amend the regulation.").

86. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

Pinpointing the Cessation Moment of a temporary regulatory taking is as important as pinpointing its Effective Moment. The fact that there is a Cessation Moment confirms that the taking is temporary. The Cessation Moment marks the end of the interval for which compensation is due.[87] This Moment also may signify the point from which interest is calculated, to the extent that interest has not otherwise been factored into the compensation award.[88] This section mirrors section A and will attempt to identify when the Cessation Moment occurs by inference from the Supreme Court's scarce clues. Most significantly, this section concludes that in the absence of an express amendment or withdrawal of the regulation or exercise of the eminent domain power, the regulatory taking should be deemed temporary and ongoing. As a result, the municipality's obligation to compensate should continue indefinitely until it reaches a decision and communicates that decision to the landowner in an unambiguous way.

1. The Government May Withdraw the Invalidated Regulation

The simplest, safest, and perhaps least costly alternative available to a local government under *First English* is to abandon the regulation altogether. The municipality that loses in court may have neither the desire nor the financial resources to continue the fight and may opt to withdraw the regulation promptly and conspicuously. This revocation, however manifested,[89] stops the compensation clock, and the municipality owes compensation to the landowner only for the period starting at the Effective Moment and ending with this Cessation Moment.

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87. *Id.*

88. *See supra* note 21 and accompanying text; *supra* note 83; *infra* text following note 115.

89. If the regulation has been held facially invalid, or if the court's decision is the first in a series of similar as-applied challenges, the municipality may opt to withdraw the regulation altogether, so as to end its ongoing liability on a series of claims that it is certain or likely to lose. If the case is an as-applied challenge that is less likely to spawn similar suits, the municipality may act more incrementally, by granting a variance or special use permit to the plaintiff, or by modifying slightly the boundaries of the zone in which the use was prohibited, so that the regulation no longer limits the landowner improperly. But whether the withdrawal of the regulation is general or specific to the landowner, there will be no question that the plaintiff now may proceed with the previously prohibited action.

2. The Government May Exercise Its Power of Eminent Domain

The landowner cannot force the government to buy the property,[90] but nothing prevents the government from freely choosing to do so.[91] The government can implement this option easily. Upon losing in court, the appropriate agency would file a condemnation proceeding under state law, condemn the property outright, and pay for it.[92] Just compensation for this second, express taking presumably would be calculated as it would in any other explicit eminent domain proceeding, and the fee would be valued for purposes of this permanent taking as of its own Effective Moment.

The government's direct exercise of its taking power would not, of course, avert the need to compensate the landowner for the prior period during which the property was temporarily taken by regulation. The municipality actually would have taken the property twice, once on a temporary basis, from the initial Effective Moment until the Effective Moment of the permanent taking, and a second time on a permanent basis, as of this second Effective Moment.[93] This "rent-to-buy" scenario would require the municipality to pay two forms of just compensation. The first of these represents the rental value[94] during the period when the original government regulation limited the owner's use of its property, and the second of these represents the fair market value of the property as of the Effective Moment for the express taking.[95] The municipality

90. *First English*, 482 U.S. at 321; Florida Rock Indus. v. United States, 18 F.3d 1560, 1572 (Fed. Cir. 1994) (footnotes omitted) (concluding that "the Government should not be put to the obligation of paying for more than it wants when it does not set out to take it. The property owner is entitled to just compensation for what is taken, no less, but no more."), *cert. denied*, 115 S. Ct. 898 (1995).

91. This assumes, of course, that the government meets the public use requirement, a requirement that has been interpreted with great flexibility. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (holding that the public use requirement is met "where the exercise of the eminent domain power is rationally related to a conceivable public purpose").

92. In fact, the government may condemn the land explicitly before the inverse condemnation suit is resolved. *See, e.g.*, Georgia-Pacific Corp. v. United States, 568 F.2d 1316 (Ct. Cl. 1978) (noting that the landowner's suit in the Court of Claims must be suspended until the government's suit in district court is completed).

93. *See, e.g.*, Creppel v. United States, 41 F.3d 627, 633–34 (Fed. Cir. 1994) (holding that, because of its earlier Effective Moment, only the prior claim was time-barred).

94. The first taking deprives the owner of the use of the property for a finite period of time. Thus, the owner suffers a taking of a term of years and deserves compensation for lost rental value, plus interest. *See supra* note 12 and accompanying text. If the owner loses only partial use of the property for a finite period, the government effectively has appropriated an easement for a temporary period and must pay the imputed rental value of that lesser estate, plus interest. *See supra* note 7.

also would have to pay interest on each component of this award from the time it became due until the time it was paid.

Rather than treating an explicit condemnation as the second of two takings, a court instead might treat the entire sequence as a single condemnation, effective as of the original Effective Moment. The court would calculate the compensation award as though the property had been condemned explicitly and permanently at that Effective Moment,[96] and then increase the award to reflect interest from the Effective Moment until the government actually pays for the entire taking.[97]

Neither of these methods is inherently more fair than the other one; they simply represent alternative methods of allocating investment risk. In fact, a court might employ each of these methods in particular cases, based on its assessment of whether the government inadvertently took property by regulation and then opted to continue the taking permanently, or intended to take the property permanently from the outset. But it would be unfair to allow one party to dictate either of these valuation methods retrospectively, after it assessed what had happened to property values during the pendency of the temporary taking.[98] The

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95. *See* Epstein, *supra* note 5, at 157–58 (recognizing, in a somewhat different context, that two-part compensation sometimes is appropriate). The Cessation Moment for the temporary taking often will occur at the time the court resolves the regulatory takings case in the landowner's favor or shortly thereafter. *See infra* note 100 and accompanying text. However, the explicit taking might not become effective until some later point, given the delays inherent in the process of condemning property explicitly. Thus, there might be a brief, non-compensable period running from the Cessation Moment of the temporary taking until the Effective Moment of the permanent taking.

Ordinarily, this should not be troubling, and the government should cease enforcement of the offending regulation during this interlude. But if the municipality were to delay the condemnation proceedings strategically, as a means of reducing the overall award while still effectively tying up the property throughout the process, then the court should award compensation for this gap period. The court could achieve this result by treating the temporary taking as having persisted while the government slowly proceeded to condemn the property. In essence, if the municipality attempts to prolong its temporary taking free of compensation, the court should push back the Cessation Moment accordingly.

Some municipalities may prefer to continue enforcement of the regulation expressly, even at the marginal cost of ongoing temporary takings compensation, out of fear that landowners will take advantage of any enforcement lulls to build the very structures the locality hoped to limit. *See infra* note 100.

96. *See, e.g.*, *Georgia-Pacific Corp.*, 568 F.2d at 1320 (pointing out that this approach "works against manipulation by owners or the Government which might occur if a later [express] taking were thought to be the taking"); R.J. Widen Co. v. United States, 357 F.2d 988, 996 (Ct. Cl. 1966) (Whittaker, J., dissenting in part) (recommending this approach).

97. United States v. Dow, 357 U.S. 17, 24–25 (1958).

98. A landowner whose property has appreciated substantially will object to the second method, as it allows the municipality to retain some portion of this appreciation. The property would be appraised as of the Effective Moment, a point antedating the unexpectedly high appreciation. The

"rent-to-buy" model probably is more in line with most parties' expectations under current law, since a temporary regulatory taking resembles an encumbrance on a fee more than it resembles a permanent taking in fee. If the landowner owns a fee simple subject to the government's regulation—whether the government's interest is "lease-like," "easement-like," or anything else—then, like any other fee simple owner, he is entitled to benefit from any appreciation in the value of the property. The government is no more entitled to this value than is the typical tenant or mortgage lender. Of course, the landowner must bear any losses as well.

3. *The Government May Amend the Regulation*

The local government's remaining option under *First English* is to amend the regulation. The municipality would attempt to relax the ordinance sufficiently that it no longer works a taking while still achieving as much of its intended effect as possible. A strict ordinance which amounted to a temporary regulatory taking would be replaced by a less extensive ordinance for which compensation is not required.

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government would pay the appraised amount to the owner along with interest from the Effective Moment forward, but the government would retain the property itself, which would have appreciated at the much higher rate. *See, e.g.*, Maxey v. Redevelopment Auth., 353 N.W.2d 812, 820 (Wis. Ct. App. 1984) (awarding only the maximum interest allowed under the applicable statute, despite the fact that the property had appreciated at a far greater rate).

Conversely, if the land has depreciated, then the municipality could pay temporary takings compensation, plus interest, abandon the challenged regulation, and then expressly condemn the property the following day. This would allow the government to acquire the property permanently, after the judgment in the temporary takings case, at the unexpectedly low current fair market price. In short, the municipality could calculate the total compensation in two different ways and always pay the lesser amount. *See, e.g.*, Foster v. City of Detroit, 405 F.2d 138, 144 (6th Cir. 1968) (rejecting a city's attempt to devalue property before taking it explicitly). *But see* United States v. 2175.86 Acres of Land, 696 F.2d 351, 354 n.2 (5th Cir. 1983) (noting that "nothing in the fifth amendment... prohibits the government from choosing the least costly method of acquiring property as long as the requirements of just compensation are met"), *aff'd sub nom.* Kirby Forest Indus. v. United States, 467 U.S. 1 (1984).

The Supreme Court has indicated some awareness of this problem. *See Kirby Forest Indus.*, 467 U.S. at 17 (footnote omitted) (noting that "[c]hange in the market value of particular tracts of land over time bears only a tenuous relationship to the market rate of interest. Some parcels appreciate at rates far in excess of the interest rate; others decline in value."). *See also* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 478 n.6 (1973) (acknowledging the distinction between prospective and retrospective valuation).

In cases in which the property appreciates at some intermediate rate, either approach might turn out to be the more fair one. The determination of which method to apply will require the court to consider other factors, such as: the frequency of rent adjustments; the extent to which the appraised rental reflects actual and predicted interest rate changes; and the extent to which the appraised value of the fee reflects actual and predicted fluctuations in the prevailing rental rates and interest rates.

This option still leaves the court with the task of calculating temporary takings compensation from the Effective Moment through the Cessation Moment, a calculation that requires pinpointing the Cessation Moment. In the typical case, the Cessation Moment will be deemed to occur at the time the amendment takes effect. However, one could argue that there should be a non-compensable interlude after the court's judgment and before the amended regulation is implemented. If pre-condemnation activities ordinarily do not merit compensation,[99] then activities preceding the enactment of valid regulations, such as periods for notice and public hearings, should not. Assuming that the municipality is willing to cease enforcement of the offending regulation while it considers amendments, the date on which it stops enforcing the original ordinance should constitute the Cessation Moment of the temporary taking.[100]

If the municipality does amend the ordinance expressly, the calculation of just compensation can become quite challenging. In the simplest case, a temporary taking, for which compensation is required, will be followed by a period of indecision or legislative activity, for which compensation probably is required,[101] and then by the enactment of an amended ordinance, for which compensation is not required. The analysis becomes more complex once one recognizes that an amendment to an ordinance that worked a temporary regulatory taking will not necessarily remedy the problem. The government may miscalculate and replace the first regulatory taking with a second one. Thus, a series of temporary takings, with periods of uncertainty interspersed, may result if the legislature wishes to keep the restrictions largely in place and relaxes them only step by inadequate step.[102] Each temporary taking is

99. *See supra* notes 46–49 and accompanying text.

100. This argument has considerable merit if the government conclusively ceases enforcement of the original regulation at some point prior to amending it, and that first point should constitute the Cessation Moment. Such an approach incorporates considerable risk, however, and is unlikely to occur. The government probably will be inclined to enforce the original regulation while it considers and enacts the weaker amended version, so as to avoid having landowners sink their foundations during any regulatory gap. The government might prefer to pay to extend the temporary taking so that it dovetails with the amended version of the regulation. *See supra* note 95.

101. *See supra* notes 99–100 and accompanying text.

102. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting) (pointing out that "[i]nvalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity"); Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C.) (noting that "Lucas might contend a subsequent unconstitutional taking has occurred," and emphasizing that "this Order is made without prejudice to the right of the parties to litigate any subsequent deprivations which may arise as the result of Coastal

compensable and the murky periods between them probably are, although there may be some brief gaps.[103] But even though the calculation may be a difficult one, each time a municipality chooses to address a regulatory taking by amending the offending regulation, the Cessation Moment for that particular taking should be deemed to occur no later than the time the amendment takes effect, regardless of the consequences of that amendment.

4. *The Government May Take No Immediate Action or May Respond Ambiguously*

A municipality that wishes to withdraw, affirm, or amend its regulation is likely to do so in some explicit fashion, and a court ordinarily will have no trouble identifying the Cessation Moment, if there is one. The situation grows more complicated if the local government takes no immediate action or responds ambiguously. A court that proclaims a regulatory taking has not found the regulation to be unconstitutional and unenforceable per se, as it might have if there were no public purpose. Rather, the court has stated that the regulation is one for which the landowner automatically is entitled to just compensation, a statement which does not necessarily resolve the question of what happens next.[104] For a variety of reasons, including carelessness,

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Council's . . . granting or non-granting of a special permit for future construction"), *on remand from* 112 S. Ct. 2886 (1992).

See also Kirby Forest Indus., 467 U.S. at 16 n.26 (acknowledging, but declining to address, some of these "complex questions"); R.J. Widen Co. v. United States, 357 F.2d 988, 996 (Ct. Cl. 1966) (observing that "[t]he taking by Massachusetts was a permanent taking of the fee on July 2nd; the occupation by the United States in March began a prior temporary taking which lasted some three months. In the circumstances of this case the two takings must be viewed as separate.").

103. *See supra* notes 99–100 and accompanying text.

104. The court may order some specific remedy, such as ongoing compensation for a continuing temporary regulatory taking. *See infra* notes 112–15 and accompanying text. The court also might insist that the municipality make its enforcement plans known within some finite period of time. *See, e.g.*, Rippley v. City of Lincoln, 330 N.W.2d 505, 511 (N.D. 1983) (ordering the city to state its intentions); *see also San Diego Gas*, 450 U.S. at 659 (Brennan, J., dissenting) (stating that "[t]he government must inform the court of its intentions vis-à-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award"). In certain circumstances, the court might enjoin enforcement of the ordinance. *See* Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 911 F.2d 1331, 1334–35 (9th Cir. 1990) (per curiam) (recognizing in dictum that the date of a preliminary injunction might constitute the Cessation Moment), *cert. denied*, 499 U.S. 943 (1991).

Even if the court fails to follow any of these courses, the plaintiff who still wants a permit is likely to take the steps that are necessary to force the municipality to act. However, the status of a regulation may remain unclear in some cases even after the court finds that the municipality has effected a temporary regulatory taking.

confusion, political indecision, or malice, the municipality may react to this outcome in an inconclusive way. If the municipality does not act decisively, will it be presumed to have left the regulation in effect, thereby permanently ratifying the condemnation by its inaction? Will the municipality be assumed to have abandoned the offending ordinance by default? Or will the government's failure to act be treated as an ongoing enforcement on a temporary basis, which it can discontinue or make permanent at some future point when it decides to act more conclusively?

(a) Silence May Be Interpreted as a Permanent Taking

The *First English* Court referred to the right to take as a "power" that requires a "decision" by the legislature.[105] This suggests that a court must observe some conspicuous expression of a municipality's intention to condemn before the court can find a permanent regulatory taking, even if no intent at all is required to effect a temporary regulatory taking. The Court likely was speculating that a permanent taking would be an affirmative legislative act initiated by the municipality in accordance with state condemnation law, not a taking-by-inertia emanating from a municipal failure to undo the effects of an unfavorable judicial decision.[106] But whatever the Court was assuming, a municipality's dereliction in reversing a judicial finding of an unintended taking seems inadequate to communicate the level of resolve required to meet the Court's standard for a permanent condemnation.[107] In the absence of any

105. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) (observing that "[n]othing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function"). *See also San Diego Gas*, 450 U.S. at 653 (Brennan, J., dissenting) (footnotes omitted) (arguing that temporary takings compensation should end "on the date the government entity chooses to rescind or otherwise amend the regulation").

106. *See First English*, 482 U.S. at 335 (Stevens, J., dissenting) (recognizing the possibility of "Legislative or Executive inertia"); Williams, *supra* note 43, at 222–23 (noting that local governments may not respond immediately to a judicial finding of a taking).

Prior to *First English*, the former Fifth Circuit was faced with an ordinance that did not initially effect a taking but may later have come to take property as a result of changed external circumstances. Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. Unit A May 1981), *cert. denied*, 455 U.S. 907 (1982). The court was required to decide whether the changed circumstances automatically converted the regulations into a taking. It concluded "that a 'taking' does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity." *Id.* at 1200 (footnote omitted). *First English* rejects this result with respect to temporary takings, but appears to support this outcome with regard to permanent takings. *First English*, 482 U.S. at 321.

further action by the legislative body, a lower federal court should not find an express, permanent taking based solely upon a municipal failure to repeal the ordinance.[108]

If a court were to recognize implied permanent takings, the compensation calculation could become complex. The court would begin by calculating compensation for a pre-judgment temporary taking, occurring as of the Effective Moment and ending as of the date of the judgment, or perhaps somewhat later. The court next would need to calculate additional compensation for the permanent taking deemed to result from the municipality's post-judgment confusion, and then would have to total these two components of the award. In the alternative, the court might treat the entire sequence as a single permanent taking that began back at the Effective Moment, reasoning that the original owner forever lost title at that early point. The results of these two calculation methods are likely to differ.[109]

(b) Silence May Be Interpreted as an Abandonment

The government might be presumed to have abandoned the regulation after the passage of some indeterminate interval. This outcome also seems unlikely, because a judicial determination that a municipal action constitutes a regulatory taking typically is not an invalidation of that action. Rather, it is a statement that the action is permissible, but one for which just compensation has been and continues to be constitutionally required. Thus there is no justification for treating protracted silence as tantamount to abandonment, and any such rule would infringe on municipal autonomy by invalidating a permissible, if unexpectedly

107. Regulators and landowners are likely to need some guidance in establishing exactly what sort of express action on the part of the municipality constitutes an abandonment or a temporary or permanent ratification of the ordinance. Will a statement by a city attorney that the city no longer intends to enforce the ordinance qualify as an abandonment? Does the result depend on whether the speaker holds a position of "policymaking authority," by analogy to procedural due process cases? Will only an outright repeal of the ordinance by the city's legislative body constitute an abandonment?

108. If the municipality does not make its intentions clear, a court might find instead that municipal inaction constitutes the continuation of an ongoing temporary taking. This is true because the less explicit action necessary to effect this less drastic type of taking already will have occurred. *See* Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1621 (1988) (questioning whether takings that are designed to be permanent but which subsequently are withdrawn merit the same treatment as takings that are designed to be temporary); *infra* notes 112–15 and accompanying text.

109. *See supra* notes 93–98 and accompanying text. Under either of these approaches, the court would have to award interest on any past-due compensation, in order to ensure that the compensation was just. *See supra* note 83.

costly, ordinance.[110] A presumption of abandonment also handicaps the landowner, who will have difficulty determining precisely when municipal silence transforms itself into municipal abandonment.

If courts treat prolonged silence as an eventual abandonment, the compensation calculation will require the pinpointing of a post-judgment Cessation Moment that the court intentionally will have left hazy. The lower court might order that the municipality act by a certain date or else some specified default event will be deemed to occur, but lower courts will not consistently act in this fashion.[111] Alternatively, the landowner could institute further proceedings to have the court declare the regulation lifted, but this assigns an unfair burden to the party who has just prevailed and might encourage spiteful silence by the municipality that has just lost. Given that most regulations affect more than one landowner, it is far more efficient for one municipality to act affirmatively than for numerous property owners to seek individual confirmation that a regulation has been lifted with respect to their property.

(c) Silence May Be Interpreted as an Ongoing Temporary Taking

The intermediate, and most appealing, approach is to infer from a municipality's inaction that it wishes to continue to enforce the restriction on an ongoing, temporary basis. The municipality's failure to act will be viewed as an endorsement of the status quo, and the temporary taking will continue at the government's expense until the government takes concrete action to abandon, ratify, or modify its regulation.[112] An explicit cessation, condemnation, or amendment will be required to alter the current situation, since none of these alternatives should be inferred from even prolonged silence, and the Cessation Moment will occur, if ever, at a point selected and expressly designated by the municipality.

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110. *See* Michael M. Berger & Gideon Kanner, *Thoughts on* The White River Junction Manifesto*: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 Loy. L.A. L. Rev. 685, 707–08 (1986) (recognizing this point).

111. *See supra* note 104.

112. *See, e.g.*, Miller Bros. v. Department of Natural Resources, 513 N.W.2d 217, 223 (Mich. Ct. App.) (holding that "the trial court cannot order the state to acquire plaintiffs' property, the taking remains temporary in nature, and the just compensation award must reflect its temporary nature," and concluding that the award should reflect the fair rental value of the property), *appeal denied*, 527 N.W.2d 513 (Mich. 1994).

This option balances most fairly the interests of the municipality and the landowner. The municipality may continue its expensive regulation until it expressly changes its mind, but must pay for the privilege. The landowner receives ongoing compensation until the regulation either expressly is suspended, at which point the unencumbered fee is restored; expressly is made permanent, at which point compensation for a permanent taking becomes due;[113] or expressly is amended, at which point the new regulation supersedes the old one.[114]

If a court were to hold that silence and indecision constitute an endorsement and continuation of the temporary regulatory taking, just compensation would amount to the fair market rental value of a leasehold beginning at the Effective Moment and continuing through the date of the judgment and indefinitely into the future.[115] By so holding, the court would be concluding that there has been no Cessation Moment, and also would be advising the condemnor that any Cessation Moment in the future will have to be clearly designated by the municipality. As in any leasehold, rent would be due periodically, interest would accrue on each periodic rental payment as of its due date, and occasional rent adjustments might be appropriate.

In summary, a municipality may respond to a judicial finding of a regulatory taking by amending the regulation, withdrawing it, or expressly taking the property. If the municipality reacts indecisively or fails to react at all, then the court must assume one of three possible default outcomes, by considering municipal inaction to be a permanent ratification, an abandonment, or a temporary ratification of the

113. Calculating this two-part compensation will be difficult. *See supra* notes 93–98 and accompanying text; *supra* note 109 and accompanying text.

114. This intermediate alternative will not satisfy some landowners, who may receive little advance warning as to when the municipality plans to change its approach. The property owner becomes much like a landlord in a tenancy that may be terminated only at the will of the municipal tenant. Note, however, that similar dissatisfaction is possible in temporary *physical* takings cases, and the landowner whose steel mill is temporarily appropriated during wartime has no greater idea when the temporary taking will end. Uncertainty is a feature of many temporary takings cases, whether those takings are by physical occupation or by regulation and whether they are direct or inverse. In some cases, that uncertainty should be reflected in the compensation award. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 14 (1949) (noting that "[e]ven if funds for the inauguration of a new business were obtainable otherwise than by the sale or liquidation of the old [temporarily taken] one, the Laundry would have been faced with the imminent prospect of finding itself with two laundry plants on its hands," and therefore concluding that compensation for loss of trade routes was required).

115. This assumes that the landowner started with a fee simple and lost all use of some portion of it for some period of time. *See supra* note 12 and accompanying text. If the owner lost a lesser interest, then the taking might more closely resemble the taking of an easement, and compensation would have to be reduced accordingly. *See supra* note 7.

ordinance. Treating silence as a permanent ratification seems to violate the express language of *First English*, while regarding silence as an abandonment inappropriately intrudes into the municipality's regulatory domain. Treating municipal indecisiveness as a continuation of the temporary regulatory taking is fair to both parties and accords with the case law. This last approach acknowledges that the local government has the ultimate right to decide how to respond to an adverse decision, as long as it compensates the landowner on a continuing basis until it exercises that right. To the extent that the government wishes to end its obligation to pay, it has the complete power to do so. Until the municipality chooses to act conclusively, however, the regulation survives at an ongoing marginal cost determined by the court.

III. PINPOINTING THE EFFECTIVE AND CESSATION MOMENTS: EXPLORING LOWER COURT APPROACHES

Lower federal courts and state courts have calculated temporary regulatory takings compensation in a surprisingly small number of cases. In many of these cases, the Effective and Cessation Moments were either obvious or uncontested, and in many of the rest, the courts simply proclaimed when these Moments occurred, without detailed analysis. Thus, it would be an overstatement to maintain that these courts actually "pinpointed" the Effective and Cessation Moments—for the most part, the courts asserted or assumed that these Moments had occurred as of specific dates and spent little time explaining their reasoning.

The fact that these courts have not defined the Effective and Cessation Moments in the detail in which they are defined here suggests that the courts may not have reflected upon these timing points as closely as they might have. Conversely, the close analysis of these cases that follows risks reading more into prior opinions than their authors may have intended. However, until judges begin to scrutinize these timing questions more closely and state what assumptions they are making and why, there will be few other clues available.

This Article aims to draw more attention to these critical timing questions. Part II offered a model that will bring greater clarity and consistency to this investigation and that will be useful in deciding future cases. Part III tests the value of that model by examining the prior cases, observing the extent to which these cases accord with the proposed model, and accounting for any discrepancies.

A. *The Court of Federal Claims and the Court of Appeals for the Federal Circuit*

The Court of Federal Claims and the Court of Appeals for the Federal Circuit, and their predecessor courts, have reached the compensation calculation in more recent regulatory takings cases than all other federal courts combined.[116] This has led some observers to conclude that plaintiffs should seek the jurisdiction of these courts whenever possible.[117] These courts do seem to afford takings plaintiffs some advantages. First, these unusually conservative courts[118] are more likely to disregard the "conceptual severance" problem and find a taking when only a small portion of a much larger tract is rendered economically non-viable.[119] Second, these two courts appear to show little regard for the

116. The United States Court of Claims was established in 1855 to hear most types of non-tort claims against the federal government. *See* Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* 103, 1145 (3d ed. 1988). Congress enlarged the scope of this court's jurisdiction several times between 1855 and 1982. *Id.* at 102–06. In 1982, Congress established the United States Claims Court, an Article I court, and granted it the trial jurisdiction formerly held by the Court of Claims. *Id.* at 1145–46. Decisions of the Claims Court are appealable only to the Court of Appeals for the Federal Circuit, an Article III court also created in 1982. *Id.* at 48, 1147. The United States Claims Court was renamed the United States Court of Federal Claims in 1992. Federal Courts Administration Act, Pub. L. No. 102-572, § 902(a)(1), 106 Stat. 4516 (1992). Takings claims against the federal government may be brought in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491 (1988 & Supp. 1993), and are appealable to the Court of Appeals for the Federal Circuit. *See infra* note 122.

117. *See, e.g.*, Keith Schneider, *Environmental Laws Face a Stiff Test from Landowners*, N.Y. Times, Jan. 20, 1992, at A1 (noting that property rights advocates have recognized that filing suit in the Claims Court is "the most successful tactic they have discovered so far"). The chief judge of the Federal Circuit, objecting to that court's remand of a case that she believed should have been dismissed, noted, "While the Supreme Court may rethink and change its rulings, this court is not free to adopt positions in conflict with decisions of the Court, anticipating that the Court will be persuaded to adopt a dissenting Justice's view." Florida Rock Indus. v. United States, 18 F.3d 1560, 1573 (Fed. Cir. 1994) (Nies, C.J., dissenting), *cert. denied*, 115 S. Ct. 898 (1995).

118. Of the 16 judges on the Court of Federal Claims, 14 were appointed by President Reagan and the remaining two by President Bush (although three of the Reagan appointees had served in prior administrations as trial commissioners for the former Court of Claims). Of the 12 judges on the Federal Circuit, five were appointed by President Bush, four by President Reagan, and one each by Presidents Clinton, Carter, and Eisenhower. Until the mid-1980s, these courts and their predecessors were not particularly inclined to rule in favor of landowners and had had few occasions to calculate compensation in regulatory takings cases. *See, e.g.*, Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (finding no taking in spite of substantial frustration of a developer's reasonable investment-backed expectations), *cert. denied*, 455 U.S. 1017 (1982); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981) (reaching the same result in a companion case), *cert. denied*, 455 U.S. 1017 (1982).

119. The Supreme Court held in *Lucas v. South Carolina Coastal Council* that the destruction of all economically viable use of a parcel constitutes a taking of that parcel. 112 S. Ct. 2886 (1992). An owner of a 50-acre lot who has 10 acres rendered useless could not credibly claim a deprivation of all economically viable use of his property, and his *Lucas* claim should fail. *But see id.* at 2895 n.8

nuisance exception.[120] Third, the federalism concerns that might dissuade a federal district court from undercutting state or local action are not present when a landowner proceeds directly against the United States in the Court of Federal Claims.[121]

But the perception that landowners win more often in these two courts is deceptive for a pair of reasons. First, while cities, counties, and states may face a greater total number of takings claims, those claims are spread out among the state courts and the federal district courts. In contrast, all takings claims against the United States are concentrated in

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(noting that a deprivation of less than all economically viable use still might constitute a regulatory taking for other reasons). However, if the owner were to subdivide his land into five 10-acre lots, he might be able to show the loss of all economically viable use of one of the smaller parcels. This anomaly in regulatory takings law, referred to as the "denominator problem" or "conceptual severance," first was identified by Justice Brandeis in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting). *See* John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 Cath. U. L. Rev. 771, 799–805 (1993) (discussing how the Court of Federal Claims and the Court of Appeals for the Federal Circuit address the conceptual severance issue); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1674–78 (1988) (identifying and discussing this problem).

The Federal Circuit has demonstrated a tendency to rule in favor of landowners even if they openly seek to enhance their chances of winning by conceptually severing their property interests. *See, e.g.*, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179–82 (Fed. Cir. 1994) (discussing the denominator problem and holding in favor of a landowner who lost the use of 12.5 acres out of an original parcel of 250 acres); *infra* notes 124–29 and accompanying text. *But see* Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334, 1356–57 (1992) (rejecting this approach), *aff'd sub nom.* Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993); *infra* notes 136–41 and accompanying text.

120. The nuisance exception holds that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 112 S. Ct. at 2899 (footnote omitted). *See also id.* at 2903–04 (Kennedy, J., concurring in the judgment) (recognizing the circularity of the Court's approach).

The Federal Circuit has shown little inclination to use the nuisance exception as a way of resisting takings liability. *See, e.g.*, *Florida Rock*, 18 F.3d at 1577 n.9 (Nies, C.J., dissenting) (noting that the nuisance exception "appears inapt as applied to federal regulation"). *But see* M & J Coal Co. v. United States, 47 F.3d 1148, 1155 (Fed. Cir.) (concluding that "[a]n 'antecedent' inquiry into the property use interests acquired by M & J thus reveals that M & J never acquired the right to mine in such a way as to endanger the public health and safety. [Appellee's] action to prevent M & J from doing so did not interfere with M & J's property use interests."), *cert. denied*, 64 U.S.L.W. 3239 (1995).

121. *See, e.g.*, Pomponio v. Fauquier County Bd. of Supervisors, 21 F.3d 1319 (4th Cir. 1994) (en banc) (abstaining from deciding a land use case arising under county zoning and subdivision ordinances); *see also* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 386–87 (1988) (concluding that the ripeness test is easier to meet in claims against the federal government). *See generally* Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 Wm. & Mary L. Rev. 301, 301–07 (1993) (discussing how the Court's move toward a "nationalization of property rights" may conflict with principles of federalism).

the Court of Federal Claims and the Court of Appeals for the Federal Circuit.[122] To some extent, the larger number of landowner victories emanating from these two courts probably reflects nothing more than a larger docket of takings cases. In addition, some of the leading takings opinions these two courts have rendered show a certain ambivalence to some plaintiffs' arguments.[123]

The Court of Federal Claims and the Court of Appeals for the Federal Circuit do not have jurisdiction over the more common cases that this Article highlights, namely takings claims brought against state and local governments in federal court. Landowners with those types of claims must travel first through the state court system and then on to the appropriate federal district court. However, the Court of Federal Claims and the Federal Circuit have had substantially more experience in calculating just compensation than any individual federal district court or state court has had. Given how infrequently other courts have reached the remedy question in regulatory takings disputes, cases from these two courts are likely to influence judges deciding similar cases elsewhere. This section discusses several significant recent cases from these two courts.

In *Loveladies Harbor, Inc. v. United States*,[124] plaintiffs owned land in New Jersey which they had been developing in phases over a period of years. Much of their land consisted of wetlands, which meant that no development was possible without a fill permit in accordance with Section 404 of the Federal Clean Water Act[125] and corresponding approvals under state law. Plaintiffs filed three applications to develop a small portion of the lot with the Army Corps of Engineers, and on May 5, 1982, the Corps finally denied the fill permit. After unsuccessfully

122. The Court of Federal Claims has jurisdiction under the Tucker Act, 28 U.S.C. § 1491 (1988 & Supp. 1993), over most takings claims brought against the United States and thus hears more takings claims than any federal district court, which will have jurisdiction over at most one state. *See generally* Jesse Dukeminier & James E. Krier, *Property* 1241 (3d ed. 1993) (discussing the jurisdiction of the Court of Federal Claims and the Court of Appeals for the Federal Circuit and commenting on both courts' seemingly conservative approach to land use cases). Takings legislation pending in Congress, if enacted, would increase the likelihood that a landowner with a claim against the United States will prevail. Therefore, this high case volume is likely to continue or grow. *See* H.R. 925, 104th Cong., 1st Sess. (1995) (Private Property Protection Act of 1995) (approved by the House of Representatives on March 3, 1995); S. 605, 104th Cong., 1st Sess. (1995) (Omnibus Property Rights Act of 1995) (introduced in the Senate on March 23, 1995).

123. *See, e.g.*, *Florida Rock*, 18 F.3d at 1573 (discussing and balancing the competing interests).

124. 28 F.3d 1171 (Fed. Cir. 1994), *aff'g* 21 Cl. Ct. 153 (1990).

125. 33 U.S.C. § 1344 (1988). Of the 250 acres that the plaintiffs originally owned, 199 had been developed before 1972, when Section 404 of the Clean Water Act was enacted. *Loveladies*, 28 F.3d at 1174.

challenging the denial in the district court and the Third Circuit, plaintiffs filed suit in the Claims Court, seeking takings compensation.[126]

The Claims Court ruled in favor of the landowners and established May 5, 1982 as the Effective Moment.[127] This Effective Moment served three of the purposes discussed in part II. It represented the instant at which the court found that the property had diminished so substantially in value that it had been taken,[128] the precise time at which the land was to be valued for compensation purposes, and the point at which interest on that award began to accrue. In exchange for the award, the landowners deeded their property to the United States. The court did not address the question of whether this deed transformed a temporary regulatory taking into a permanent physical taking or whether the taking had been a permanent one from the outset. Thus, the opinion lacks any discussion of the Cessation Moment.[129]

Whitney Benefits, Inc. v. United States,[130] decided three years before *Loveladies*, was a more substantial victory for the landowners in terms of both the scope of the opinion and the size of the award. The plaintiffs in *Whitney Benefits* alleged that the August 3, 1977, enactment of the Surface Mining Control and Reclamation Act (SMCRA)[131] deprived them of all economically viable use of coal rights underlying several hundred acres of land they owned and leased in Wyoming.[132] The Claims Court agreed, finding a facial taking of the coal rights on the date SMCRA became effective, and the Federal Circuit affirmed the court's award of $60,296,000, plus interest for fourteen years, attorney fees, and costs.[133] The Effective Moment served the same three functions as it had in *Loveladies*—once again, in accordance with the recommendations

126. *Loveladies*, 21 Cl. Ct. 153.

127. *Id.* at 161.

128. *Id.* at 155–59. Note that this was the time at which the statute first effected a taking, and not the much earlier date on which the Clean Water Act first became effective. *See also* Klamath & Modoc Tribes v. United States, 436 F.2d 1008, 1019–20 (Ct. Cl.) (finding that passage of the relevant act predated the actual taking), *cert. denied*, 404 U.S. 950 (1971); Bowles v. United States, 31 Fed. Cl. 37, 52 (1994) (holding that the denial of plaintiff's application for a septic system permit effected a regulatory taking as of the denial date).

129. The damages portion of the opinion implies that the permit denial effected a permanent taking. The court did not, however, specifically discuss this point. *Loveladies*, 21 Cl. Ct. at 161.

130. 926 F.2d 1169 (Fed. Cir.), *aff'g* 18 Cl. Ct. 394 (1989) and 20 Cl. Ct. 324 (1990) (corrected opinion), *cert. denied*, 502 U.S. 952 (1991).

131. 30 U.S.C. §§ 1201–1328 (1982).

132. *Whitney Benefits*, 926 F.2d at 1170, 1178.

133. *Id.* at 1177–78.

made in part II of this Article—but the court here found a facial taking,[134] and a much more expensive one, as of the date that the restrictive legislation became effective. The court seems to have assumed that the regulatory taking was a permanent one and thus had no need to discuss the Cessation Moment.

Landowners familiar with only these cases might eagerly seek the jurisdiction of the Court of Federal Claims whenever possible. Two other recent decisions by the Federal Circuit will dampen their enthusiasm, however. In *Florida Rock Industries v. United States*,[135] the court issued a somewhat more balanced analysis of the substantive takings issue and remanded the case for further proceedings, and in *Tabb Lakes, Ltd. v. United States*,[136] the court found that no taking had occurred at all.

In *Tabb Lakes*, the first of the two cases, the landowner claimed that a regulatory taking began on the date when the Army Corps of Engineers issued a cease and desist order prohibiting the landowner from filling wetlands. The landowner alleged that the taking did not end until three years later, when a Fourth Circuit judgment holding that the Corps had no jurisdiction over the property became final. The Federal Circuit affirmed that the Corps's issuance of the order constituted part of the government's preliminary decisionmaking process and thus could not work a taking.[137]

Although both the trial and appellate courts in *Tabb Lakes* found for the government,[138] and despite the fact that neither court had any reason to pinpoint the Effective and Cessation Moments, the Federal Circuit commented significantly about the determination of the Effective Moment. The court noted that the Supreme Court has held that a landowner's initiation of permit proceedings does not constitute a

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134. *Whitney Benefits*, 18 Cl. Ct. at 407 (asserting that "Congressional intent as to the Whitney coal was abundantly clear when it passed SMCRA. Plaintiffs' property was taken at its enactment.").

135. 18 F.3d 1560, 1564–73 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995). *Florida Rock* has spent 10 years in federal court so far. Florida Rock Indus. v. United States, 8 Cl. Ct. 160 (1985), *aff'd in part and vacated in part*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *on remand to* 21 Cl. Ct. 161 (1990) and 23 Cl. Ct. 653 (1991), *vacated and remanded*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995). *See infra* notes 142, 147.

136. 10 F.3d 796 (Fed. Cir. 1993), *aff'g* 26 Cl. Ct. 1334 (1992).

137. *Id.* at 800–01 (citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)). *See also supra* notes 46–49 and accompanying text.

138. The Claims Court emphatically rejected the landowner's attempt to employ a conceptual severance argument, referring to it as "gerrymandering," *Tabb Lakes*, 26 Cl. Ct. at 1356, "'artificially segment[ing],'" *id.* at 1357 (quoting Def.'s Br., filed Sept. 11, 1992, at 6 n.3), and an "attempt to distort the economic picture by segregating development activities," *id.* at 1357.

taking,[139] even in cases in which the permit is denied. In response to the landowner's argument that subsequent events retroactively converted an earlier date—the date of the cease and desist order—into the Effective Moment, the court noted:

> [N]othing in case law suggests that unreasonable delay converts the first preliminary act into the date of the taking. . . . [O]nly after the delay becomes unreasonable would a taking *begin*. . . . Because the [cease and desist] order of October 8, 1986, did not effect a taking when issued, subsequent acts do not change its nontaking character.[140]

This analysis properly recognizes that the Effective Moment cannot occur until all administrative activity has concluded.[141]

In *Florida Rock*, the landowner acquired a 1560-acre parcel near Miami for the purpose of extracting limestone underlying surface wetlands. The Army Corps of Engineers subsequently enacted regulations that required the landowner to obtain a dredge and fill permit, and Florida Rock sought such a permit covering ninety-eight acres. The Corps denied the permit on October 2, 1980, and Florida Rock, conceding the validity of the denial, sought takings compensation. The Claims Court twice held for Florida Rock and awarded compensation, and the Federal Circuit twice vacated and remanded.[142]

The Claims Court accepted the date of the permit denial as the Effective Moment,[143] thereby affirming that the last event in the

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139. *Tabb Lakes*, 10 F.3d at 801–02 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

140. *Id.* at 803 (citations omitted).

141. *See also* Hendler v. United States, 952 F.2d 1364, 1375 (Fed. Cir. 1991) (noting that while a specific EPA order, standing alone, did not work a regulatory taking, "subsequent events, in light of the character of the Government's action and plaintiffs' distinct investment-backed expectations, might have had sufficient economic impact on the plaintiffs to constitute a regulatory taking"); Foster v. United States, 607 F.2d 943, 951 & n.8 (Ct. Cl. 1979) (finding that the date of final refusal of access to the property constituted the Effective Moment); 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 579 (1992) (stating that "the purpose of the Corps' preliminary denial was to invite the submission of any additional information which Atlantic chose to submit in support of its application. . . . Disapproval of the amended application was not a foregone conclusion at that point" and concluding that "the court will not consider the period prior to the July 29, 1982 issuance of the Corps' final decision").

142. *See* Florida Rock Indus. v. United States, 18 F.3d 1560, 1562–64 (Fed. Cir. 1994) (describing the lengthy history of the case), *cert. denied*, 115 S. Ct. 898 (1995); *supra* note 135; *infra* note 147. The case has not yet been resolved as of October, 1995.

143. Florida Rock Indus. v. United States, 8 Cl. Ct. 160, 179 (1985) (holding that "[t]he taking occurred on October 2, 1980, the date the permit was denied"); *id.* at 174 n.16, 178 (referring to the October 2, 1980 permit denial as the "decisional document"). *See also id.* at 166 (finding that "denial

regulatory sequence, and not earlier events such as the enactment of the land use restriction, constitutes the Effective Moment of an as-applied taking. The Federal Circuit vacated this first opinion in part and remanded for several reasons, suggesting all the while that a taking probably had occurred.[144] By remanding, the appeals court spared itself the task of pinpointing the Effective and Cessation Moments.

The Federal Circuit emphasized that any taking that might have occurred affected only the ninety-eight acres for which Florida Rock had sought a permit and not the rest of the 1560 acres that it owned.[145] This physical limitation on any taking resulted from the impossibility of dredging more than ninety-eight acres of limestone in a three-year period, and the remaining land could not have been used productively even in the absence of any land use restrictions. Because nothing else had happened to affect the use of the land, no taking could have occurred, since "to hold the mere enactment of the statute a taking would be contrary to *Hodel*, *Agins*, and indeed, just about all the recent Supreme [C]ourt authorities."[146] Moreover, "[i]f the taking legally occurs [as to the entire parcel] at the start of the three years, interest starts to run, which seems unfair when Florida Rock never expected to derive income from it."[147]

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of the Corps permit deprived plaintiff of the only economically viable use of its property—rock mining"). The Claims Court also ordered that interest on the compensation award would run from this same date. Florida Rock Indus. v. United States, 791 F.2d 893, 897 (Fed. Cir. 1986) (summarizing the Claims Court's oral order regarding compensation), *cert. denied*, 479 U.S. 1053 (1987).

144. *Florida Rock*, 791 F.2d at 905 (stating that "the record reveals a substantial possibility that a taking . . . occurred").

145. *Id.* at 904–05.

146. *Id.* at 905 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), and Agins v. City of Tiburon, 447 U.S. 255 (1980)). *See* Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 889 (Fed. Cir. 1983) (remarking that "what counts is not what [the] government said it was doing . . . . What counts is what the government *did*."); Hendler v. United States, 11 Cl. Ct. 91, 96 (1986) (pointing out that "[u]ntil the order was executed, defendant had not done anything to the property or to plaintiffs' rights in it"). *But see* Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1170–72 (Fed. Cir.) (noting, in a facial challenge, that the applicable statute prohibited the issuance of a mining permit for any of the owners' land), *cert. denied*, 502 U.S. 952 (1991); *supra* notes 130–34 and accompanying text.

147. *Florida Rock*, 791 F.2d at 905. *Florida Rock* did not end there. On remand, the Claims Court once again found a taking, with a stipulated Effective Moment of October 2, 1980. Florida Rock Indus. v. United States, 21 Cl. Ct. 161, 176 (1990) (noting that the parties agreed to this date, valuing the property as of this date, and awarding interest from this date); *id.* at 165 (noting that a central question is "the fair market value of plaintiff's property after the denial of its permit application"); *id.* at 169 (noting that "plaintiff presented credible and competent evidence of the property's pre-permit-denial fair market value"); *id.* at 170 (noting plaintiff's attention to "the property's value after

To date, the Federal Circuit has had no occasion in *Florida Rock* to specify when the Effective Moment *does* occur, but it appears to have ruled out the date on which the regulation became effective. Thus, the federal appeals court with the most experience in regulatory takings cases and the most conservative approach to such cases has affirmed that the effective date of a land use restriction does not constitute the Effective Moment of an as-applied regulatory taking. This conclusion accords fully with the definition of the Effective Moment proposed in part II.[148] A taking does not become effective and compensation does not begin to accrue until other events—events which the *Florida Rock* court has had no cause to identify so far—interact with the restriction to bring about actual losses.

The Court of Federal Claims and the Court of Appeals for the Federal Circuit have offered much useful guidance in defining when the Effective and Cessation Moments occur. The direction these courts have provided supports the analysis recommended in part II, although these courts have not had occasion to address all of the issues examined there. Other federal courts hear the more typical takings fact patterns that arise out of state and local regulatory activities. These other courts decide a larger proportion of their regulatory takings cases in favor of the government, but their opinions nonetheless provide additional clues as to when the Effective and Cessation Moments occur.

B. Other Federal Courts

Lower federal courts outside of the Federal Circuit appear to have calculated compensation in only six reported temporary regulatory takings cases.[149] One of these cases predates *First English* and could not

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the denial of plaintiff's permit application"); *id.* at 175 (accepting "plaintiff's position that the value of the parcel remaining after the denial of its permit applications is $500 per acre").

Once again, the Federal Circuit vacated and remanded. Florida Rock Indus. v. United States, 18 F.3d 1560, 1565–68, 1572–73 (Fed. Cir. 1994) (criticizing the Claims Court's valuation method and noting that this flaw might be substantial enough to undercut the finding that the diminution in value was large enough to constitute a taking), *cert. denied*, 115 S. Ct. 898 (1995). *See supra* notes 135, 142

148. *See supra* part II.A.3.

149. Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir.), *vacated en banc and reh'g granted*, 42 F.3d 626 (11th Cir. 1994); Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990) (per curiam) [hereinafter *Wheeler IV*]; Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985) [hereinafter *Nemmers II*]; Herrington v. County of Sonoma, 790 F. Supp. 909 (N.D. Cal. 1991), *aff'd*, 12 F.3d 901 (9th Cir. 1993); Corn v. City of Lauderdale Lakes, 771 F. Supp. 1557 (S.D. Fla. 1991), *aff'd in part and rev'd in part*, 997 F.2d 1369 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1400 (1994); Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal,

have been guided by its holding.[150] Three others did not survive appeals or rehearings and consequently serve as little more than non-binding illustrations of how a court might calculate the appropriate remedy.[151] Three of the six cases may not yet have been finally resolved.[152] Each of these six cases exhibits factual quirks that limit its precedential value. Moreover, three of these cases ostensibly were not takings cases at all,[153] although the calculation method used in parallel takings claims might not have differed. In short, the tremendous number of regulatory takings claims to arise under state and local law has translated into a surprisingly small number of cases in which a federal court actually crafted a monetary award for a property owner.[154]

Courts that face the compensation question in the future will have little precedent to work with and are likely to focus intently on the few cases that already have been decided.[155] Once again, it would be an exaggeration to assert that the six opinions discussed here focused on pinpointing the Effective and Cessation Moments. But future courts will have little other precedent to rely upon and are likely to look to this handful of decisions for guidance in establishing when these critical points occur. This section examines these cases.

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749 F. Supp. 1439 (W.D. Va. 1990), *vacated*, 945 F.2d 760 (4th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992). *See also* New Port Largo, Inc. v. Monroe County, 985 F.2d 1488 (11th Cir.) (discussing the Effective Moment in detail and remanding the case in a per curiam opinion with two special concurrences), *cert. denied*, 114 S. Ct. 439 (1993); Hernandez v. City of Lafayette, 643 F.2d 1188, 1200–01 (5th Cir. Unit A May 1981) (discussing the compensation issue in general terms in a pre-*First English* case), *cert. denied*, 455 U.S. 907 (1982).

150. The Eighth Circuit decided *Nemmers II* in 1985, two years before the Supreme Court's decision in *First English*.

151. The Eleventh Circuit, sitting en banc, vacated *Highland Beach* and granted a rehearing. 42 F.3d at 626. That court also reversed *Corn* on substantive due process grounds, thereby mooting the district court's discussion of the compensation issue. 997 F.2d at 1393. The Fourth Circuit twice vacated *Front Royal* on abstention grounds without ever reaching the compensation issue. 945 F.2d at 765; McLaughlin v. Town of Front Royal, No. 93-1034, 21 F.3d 423 (4th Cir. Apr. 5, 1994) (Westlaw, CTA database) (unpublished opinion).

152. *Front Royal*, *Corn*, and *Highland Beach* still may not have been resolved as of October, 1995.

153. *Nemmers II* was a vested rights case, *Corn* was resolved on substantive due process grounds, and *Herrington* was a due process and equal protection case.

154. Federal courts, including the Supreme Court, have had a greater number of opportunities to calculate temporary takings compensation in cases involving physical, rather than regulatory, takings. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 6–16 (1949) (affirming one portion of the lower court's award but reversing and remanding for a determination of the value of trade routes); United States v. Petty Motor Co., 327 U.S. 372 (1946) (recalculating the value of a condemned leasehold).

155. Note that the later cases discussed in this section relied heavily on the earlier ones.

The Eighth Circuit calculated a monetary remedy in *Nemmers v. City of Dubuque (Nemmers II)*,[156] a case predating *First English* by two years. In *Nemmers II*, the landowner spent $140,000 in development costs in reliance upon an existing light industrial zoning classification and the prior approval of a preliminary plat for his tract. The city then involuntarily annexed the landowner's property and rezoned the land for residential and agricultural use. The Eighth Circuit concluded that the landowner's right to build a light industrial park already had vested.[157]

In calculating compensation in *Nemmers II*, the Eighth Circuit accepted the district court's unpublished finding that the date of the taking was October 22, 1980, a date which nearly coincided with the October 6, 1980, date on which the city rezoned the property.[158] Because the city had withdrawn a prior zoning classification, the court found the city liable for revocation of a vested right; thus, the case was not a regulatory takings case at all.[159] This legal distinction explains why the court's analysis differs somewhat from that seen in the other federal cases examined here[160] and also makes the Effective Moment fairly easy to pinpoint. By selecting a date approximating the date of the rezoning, the Eighth Circuit awarded compensation from the point at which the city took its last administrative action prior to federal court litigation, an approach similar to the one recommended here for regulatory takings cases.[161]

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156. 764 F.2d 502 (8th Cir. 1985), *on appeal after remand from* 716 F.2d 1194 (8th Cir. 1983) [hereinafter *Nemmers I*].

157. *Nemmers I*, 716 F.2d at 1200.

158. *Nemmers II*, 764 F.2d at 504. *Nemmers I* and *II* are typical of these cases in that the court never supplied definitions of the Effective and Cessation Moments and simply relied on the parties' stipulations.

159. Although some courts regard *Nemmers I* and *II* as temporary regulatory takings cases, the Eighth Circuit specifically stated that the dispute involved a vested rights claim. *Nemmers I*, 716 F.2d at 1197 (holding that "Nemmers had a vested right to continued light industrial zoning .... In view of this holding, we find it unnecessary to reach the federal due process and takings claims."). *But see Nemmers II*, 764 F.2d at 504 (referring to the "date of the taking"); *Nemmers I*, 716 F.2d at 1200 (concluding that "[w]e remand for a determination of appropriate relief for the uncompensated *taking* of that [vested] right by the City") (emphasis added). The two *Nemmers* opinions suggest that either legal theory should have resulted in the same award, a suggestion which appears to be incorrect. *See infra* note 160.

160. The landowner appears not to have appealed the rezoning, sought a variance, or demanded compensation at the state level. Had the court chosen to treat the claim as one for a temporary regulatory taking, it would have directed the owner to seek a variance and demand compensation at the state level before the federal court could find the case ripe. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186–97 (1985). This would have delayed the Effective Moment and reduced the award accordingly.

161. *See supra* part II.A.3.

The parties stipulated at trial that the city would rezone the land for light industrial use upon entry of judgment against the city by the district court.[162] This rezoning constituted a clear revocation of the improper downzoning and an end to any temporary taking or other deprivation. Thus, the Cessation Moment was not in dispute.

Pinpointing the Effective and Cessation Moments was equally easy in *Wheeler v. City of Pleasant Grove (Wheeler IV)*,[163] an Eleventh Circuit case resulting from the withdrawal of a building permit. After advising the landowner that construction could proceed, the municipality then enacted an ordinance banning construction. Fourteen months later, the district court enjoined the municipality from enforcing that ordinance. The appellate court designated the effective date of the ordinance as the Effective Moment and the date of the injunction as the Cessation Moment, and calculated compensation accordingly, citing *Nemmers II*.[164] The court's definitions of the Effective and Cessation Moments conform to the model proposed in part II,[165] but the court had no other points from which to choose—the facts of this case were so unambiguous that there could be little doubt as to when the Effective and Cessation Moments occurred.

The Western District of Virginia had to identify the Effective and Cessation Moments in *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*.[166] *Front Royal* arose from the violation of a state court order fixing dates by which the town was required to extend sewer service to several industrial lots.[167] The federal district court found the unmet deadline for each of these lots to be the Effective Moment for

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162. *Nemmers II*, 764 F.2d at 504 n.1.

163. 896 F.2d 1347 (11th Cir. 1990) (per curiam). The frequent use of Roman numerals as suffixes in these opinions illustrates how temporary regulatory takings cases can drag on for years. *Wheeler* went to the Eleventh Circuit four times, and that court entered judgment in a specific amount rather than remand the case once again to the district court so as "[t]o forestall the possibility of writing the script for *Wheeler V*." *Id.* at 1349.

164. *Id.* at 1350.

165. The district court did not explain why it enjoined the construction ban altogether rather than designating it a continuing temporary taking and allowing the city the option of maintaining the ban and paying ongoing just compensation. *See, e.g.*, Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 749 F. Supp. 1439 (W.D. Va. 1990), *vacated*, 945 F.2d 760 (4th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992); *infra* notes 166–72 and accompanying text. This departure from the model proposed in part II is misguided. The question was not whether the city can bar construction, which it clearly can, but whether it must pay for this right.

166. 749 F. Supp. 1439 (W.D. Va. 1990), *vacated*, 945 F.2d 760 (4th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992).

167. *Id.* at 1441.

that lot.[168] Some of the lots had received sewer service by the time of the decision, and the court found the Cessation Moment for each of these lots to be the date on which it eventually received service.[169] Other lots still were not served, and the court found these takings to be ongoing.[170] As in *Nemmers II*, *Wheeler v. City of Pleasant Grove (Wheeler III)*,[171] and *Wheeler IV*, on which the *Front Royal* court relied heavily, the municipality's constitutionally infirm actions made the identification of the Effective and Cessation Moments difficult to dispute, and the court's findings accord with the model proposed in part II. The Fourth Circuit subsequently vacated this opinion on abstention grounds.[172]

The Southern District of Florida was required to pinpoint these two Moments in *Corn v. City of Lauderdale Lakes*.[173] While the landowner's preliminary site plan for a mini-warehouse was pending, the city rezoned the property to eliminate storage warehouses as a permitted use and also imposed a temporary building moratorium to cover the period prior to the effective date of the rezoning.[174] A state appellate court subsequently ruled in the landowner's favor on estoppel grounds.[175] The federal district court designated the date the moratorium was adopted as the Effective Moment of a substantive due process violation and found the date of the state court mandate to be the Cessation Moment,[176] thereby selecting points that conform to the definitions of the Effective and Cessation Moments proposed in part II. Although the federal district court's opinion was rendered on substantive due process grounds, that court, the Eleventh Circuit, and the plaintiff all noted that the plaintiff's related

168. *Id.* at 1441–42, 1448–49. The court applied the same approach in a companion case, although the dates differed. *See id.* at 1441, 1448.

169. *Id.* at 1441–42, 1448–49.

170. *Id.*

171. 833 F.2d 267 (11th Cir. 1987) [hereinafter *Wheeler III*].

172. Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 945 F.2d 760, 763–65 (4th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992).

173. 771 F. Supp. 1557 (S.D. Fla. 1991), *aff'd in part and rev'd in part*, 997 F.2d 1369 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1400 (1994).

174. Corn's attempt to gain permission to build the mini-warehouse ran into substantial opposition from residents of a condominium development he had previously constructed next door. *Id.* at 1378–82; *id.* at 1381 (quoting a city council member who noted that "these people who have these homes, and bought these condominiums have as much vested interest in their land as the builder").

175. City of Lauderdale Lakes v. Corn, 427 So. 2d 239 (Fla. Dist. Ct. App. 1983).

176. *Corn*, 771 F. Supp. at 1571. Corn argued that the Cessation Moment did not occur until he attempted to enforce this judgment two years later. The district court disagreed, noting that this two-year delay was caused by Corn and not by the city. *Id.*

takings claim was nearly identical.[177] The Eleventh Circuit reversed the trial court on the liability question,[178] however, thereby mooting the trial court's extended discussion of the appropriate compensation award.[179]

The Northern District of California addressed these same timing questions in *Herrington v. County of Sonoma*, a due process and equal protection case subsequently affirmed by the Ninth Circuit.[180] The county found the landowners' plan to construct thirty-two homes to be inconsistent with the county's general plan, and the court found the date of this determination to be the Effective Moment. The court held that normal administrative delays prior to this date were non-compensable, but concluded that the county's determination of inconsistency constituted a "red light" to the property owners.[181] The court estimated that the Cessation Moment occurred eighteen months later, an assessment based upon the amount of time normally required to process a subdivision map application, the amount of time it would have taken the landowners to pursue appropriate procedures in state court, and the times set forth in a related state statute.[182] In other words, the violation ended for compensation purposes at the point that it most likely would have ended had the parties acted as they should have.

This opinion, like the others examined in this section, accords with the definitions proposed in part II of this Article. But unlike those other cases, this opinion offered the court numerous alternative possibilities for the Effective and Cessation Moments, possibilities the court wisely avoided selecting. The court astutely placed the Effective Moment after all routine pre-condemnation events had transpired, thereby avoiding

177. *Id.* at 1566 n.5, 1569–70; *Corn*, 997 F.2d at 1372, 1393 & n.3. Eleventh Circuit case law recognizes four related types of challenges to land use regulations, including "substantive due process claims" and "just compensation claims." *See* Eide v. Sarasota County, 908 F.2d 716, 720–22 (11th Cir. 1990). Corn's original complaint alleged both types of claims, but the two opinions addressed only the former claim. *Corn*, 997 F.2d at 1372–92; *Corn*, 771 F. Supp. at 1565–70.

178. *Corn*, 997 F.2d at 1392–93.

179. The district court awarded compensation of $727,875, including interest, *Corn*, 771 F. Supp. at 1573, and provided the most detailed compensation discussion of any federal court to date. The opinion includes nearly five pages of "Findings of Fact," four tables, and a 10-page appendix detailing the calculation. *Id.* at 1559–65, 1573–83.

180. 790 F. Supp. 909 (N.D. Cal. 1991), *aff'd*, 12 F.3d 901 (9th Cir. 1993). The trial court produced neither tables nor an appendix, but did develop a detailed and extremely helpful algebraic equation as a tool to be used in calculating temporary regulatory takings compensation. *Id.* at 915–16.

181. *Id.* at 915.

182. *Id.* at 922.

giving a windfall to the landowners.[183] And since the plaintiffs could have hastened the arrival of the Cessation Moment, the court prudently estimated when this Moment had occurred, so as to avoid rewarding a lack of diligence. In a situation in which it could have erred significantly, the court reached a result that seems appropriate.

Most recently, the Eleventh Circuit calculated temporary regulatory takings compensation in *Resolution Trust Corp. v. Town of Highland Beach.*[184] The defendant town commission originally agreed that its approval to build a residential planned unit development would expire in 1990, but later determined, over the landowner's objections, that it would expire in 1985. The court concluded that the 1985 date constituted the Effective Moment of a taking.[185] The opinion is unclear as to which of three dates constituted the Cessation Moment. While the court refers to March 2, 1992, as the Cessation Moment, it does not state the significance of this date anywhere in the opinion.[186] The court also refers to the original expiration date of August 8, 1990, and the August 26, 1990, date that the trial jury determined to be the Cessation Moment.[187] The court seems to have selected Effective and Cessation Moments that are roughly correct, but its remedy discussion, interpreting and modifying a confusing jury verdict, is difficult to comprehend. The Eleventh Circuit, sitting en banc, subsequently vacated the panel's opinion and granted a rehearing.[188]

The six federal court opinions that this section has examined all seem to accord with the framework for pinpointing the Effective and Cessation Moments that this Article has proposed. At the same time, these cases hardly provided rigorous tests for the proposed model—there have been only six of them so far, and in several, the Effective and Cessation Moments were fairly easy to pinpoint. The limited federal court case law conforms to the model that this Article recommends, but the case law has not yet provided a demanding test of this model.

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183. See *supra* notes 46–49 and accompanying text for a discussion of the reasons why courts should avoid compensating landowners for events that constitute pre-condemnation activities.

184. 18 F.3d 1536 (11th Cir.), *vacated en banc and reh'g granted*, 42 F.3d 626 (11th Cir. 1994).

185. *Id.* at 1549–50, 1552.

186. *Id.* at 1552–53. This appears to be the date as of which the landowner's expert witness appraised the property, which would have fallen at about the time of the trial.

187. *Id.* at 1545–46, 1551.

188. *Highland Beach*, 42 F.3d at 626.

C. *State Courts*

This Article focuses on cases in which federal courts must calculate regulatory takings compensation. However, the dearth of federal case law has led many federal courts to look to the state courts for guidance.[189] Most reported state condemnation cases involve physical occupation of the property by the government, such as when the state enters onto the property before commencing condemnation proceedings. The major question in cases such as these is whether to value the property as of the date the state occupied the property or as of the later date on which it commenced legal proceedings. Identification of the Effective Moment is critical—if easier—even in physical occupation cases if this gap is lengthy, if property values have changed dramatically between these two dates, if the statute of limitations has expired as to the earlier date but not the later one, or if post-taking interest will constitute a major component of the award.

State courts facing these issues, however, often rely upon state constitutions, statutes, and case law, making many of their opinions useful only in the state and federal courts of that state. The result is that cases from one state tend to have little influence elsewhere, and this disorderly case law offers only limited guidance to federal courts.[190] Moreover, the number of state cases addressing regulatory takings is substantially smaller than the number of state cases involving physical occupations by the government. The overall result is that only a handful of state court opinions have proved useful to federal courts that are looking to pinpoint the Effective and Cessation Moments of a temporary regulatory taking. The state courts, like their federal counterparts, often assume or assert that these Moments occurred at specific points, without supporting their assumptions or even acknowledging that they are making assumptions that are significant to the outcome. Several state courts, however, have provided some useful guidance in their opinions.

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189. Justice Brennan suggested that he supported this technique. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658–59 (1981) (Brennan, J., dissenting) (noting that "[o]rdinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary 'takings' involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory 'taking'").

190. *See* 26 Am. Jur. 2d *Eminent Domain* § 152, at 815 (1966 & Supp. 1995) (noting that "[o]wing to the great diversity of constitutional and statutory provisions governing condemnation proceedings in the different states, it is impossible, even if it were desirable, to lay down a universal rule on this point").

This section examines the most helpful state court cases, with emphasis on the case law of Arizona, California, and Florida.

Arizona case law offers a good starting point, because its state supreme court has considered a number of cases in which the Effective Moment was in dispute. As far back as 1960, the court ruled that a provision of Arizona law that had the effect of giving the condemning authority a choice of valuation dates violated the Arizona Constitution's takings clause.[191] The case involved a regulatory restriction that preceded the commencement of eminent domain proceedings, and the court held that the government could not be allowed to impair property rights for up to two years and then abandon the restriction entirely without paying compensation.[192] The Effective Moment must be determined by reference to the time when "the landowner's rights [were] greatly inhibited."[193]

Two years later, the same court considered a statute that allowed the condemning authority to take possession immediately but that fixed compensation as of the trial date.[194] The court noted that while the legislature is permitted to establish a convenient date such as the trial date to serve as the Effective Moment, a condemnor that deprives a landowner of the use of its property prior to that date must compensate the landowner for that deprivation.[195] The additional compensation may take the form of interest on the award for the duration of this interval, or the "use value of the property"—presumably the rental value—for this time span.[196] This conclusion suggests that the Effective Moment for purposes of valuation can differ from the Effective Moment for purposes of interest accrual, an approach that conflicts with the recommendations contained in part II of this Article. [197]

The Arizona Supreme Court did not hold temporary regulatory takings to be compensable until 1986, in *Corrigan v. City of Scottsdale*,[198] a case

191. State *ex rel.* Willey v. Griggs, 358 P.2d 174, 177 (Ariz. 1960) (noting that the statute "gives the [State Highway] Commission . . . two years to change their mind or pay. This the State cannot have.").

192. *Id.* at 175–77.

193. *Id.* at 176.

194. Desert Waters, Inc. v. Superior Court, 370 P.2d 652 (Ariz. 1962).

195. *Id.* at 659.

196. *Id.*

197. The court, in effect, concluded that a temporary taking followed by a permanent taking might have occurred, just as part II of this Article acknowledges. However, the court's proposed method of calculating compensation departs from the method suggested in part II. *See supra* notes 93–98 and accompanying text.

198. 720 P.2d 513, 515–16 (Ariz.), *cert. denied*, 479 U.S. 986 (1986). *Griggs* arguably could be read as having held that temporary regulatory takings must be compensated, although the *Griggs*

which also provided the court with its first occasion to address the issue of how this compensation should be calculated.[199] In *Corrigan*, the court listed five different methods for calculating just compensation in temporary regulatory takings cases and acknowledged that each approach will be useful in only some factual settings.[200] If anything, the court clouded takings law still further, by importing into its newly-announced compensation phase all of the fact specificity that had already obscured the substantive question of "what is a taking."[201]

About the only useful guidance found in the published opinions is the appeals court's apparent agreement with the testimony of the landowner's appraiser, who stated that "Corrigan's property was worth $31,365,500 prior to enactment of the ordinance and $17,728,000 under the ordinance."[202] This testimony suggests that the appraiser believed that the Effective Moment occurred when the ordinance was enacted, or was instructed to appraise the property under that assumption. Supporting this conclusion is the court of appeals's statement that "[i]f the rezoning renders the property useless it amounts to a confiscation without compensation, making the attempted rezoning void."[203] These statements suggest that the claim was a facial challenge—a view that appears to be correct—in which case the Effective Moment would have to have

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court never discussed how this compensation should be calculated. *See* State *ex rel.* Willey v. Griggs, 358 P.2d 174, 177–78 (Ariz. 1960).

199. *Corrigan*, 720 P.2d at 518–19. *See also* Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 Cath. U. L. Rev. 721, 757–69 (1993) (discussing how to calculate compensation); Tretbar, *supra* note 43, at 215–40 (discussing a variety of calculation methods in detail).

200. *Corrigan*, 720 P.2d at 518. This "multiple-choice" analysis offers little guidance to the landowner, municipal official, or attorney who must predict the outcome of a budding dispute or to the judge who must calculate the appropriate remedy on the basis of specific facts. *See id.* (noting that "each measure of damages [may be] . . . a 'guessing game' between too little compensation on the one hand and providing a windfall on the other. . . . [T]he proper measure of damages in a particular case is an issue to be decided on the facts of each individual case."); Mikitish, *supra* note 14, at 993–1001 (discussing these five methods).

Compounding the difficulty in advising clients is the fact that prudent owners and municipalities seek legal advice in the early stages of a dispute, before all of the facts have developed. Thus, while courts may decide which legal standard is most appropriate based on the facts that already have occurred, lawyers must offer advice while the facts still are developing.

201. Note that the Arizona Supreme Court had to remand the case to the trial court for a determination of the proper compensation. *Corrigan*, 720 P.2d at 519.

202. Corrigan v. City of Scottsdale, 720 P.2d 528, 539 (Ariz. Ct. App. 1985) (footnote omitted), *aff'd in part and vacated in part*, 720 P.2d 513 (Ariz.), *cert. denied*, 479 U.S. 986 (1986). The City's appraiser, not surprisingly, reached a different conclusion. *Id.*

203. *Id.* at 540.

occurred at the time when the rezoning took effect. But neither court states this conclusion expressly.

The court finally had occasion to pinpoint the Effective Moment in a 1993 case, *Calmat of Arizona v. State ex rel. Miller*,[204] which involved a physical occupation by the state that preceded the summons date by about eighteen months. The trial court instructed the jury to value the property as of the later summons date, in accordance with a state statute that expressly applied only to direct condemnations, and the appeals court affirmed that portion of the trial court's ruling.[205] The Arizona Supreme Court reversed, emphasizing that the just compensation requirement is designed to place the landowner in as good a position as if no taking had occurred:

> The valuation statute fulfills this purpose in a direct condemnation action because the property is valued at a point close in time to the actual taking. Applying this statute to an inverse condemnation action, however, does not achieve this same effect due to the timing differences inherent between the two types of condemnation actions.[206]

In fact, as the court pointed out, "[T]he summons' date in an inverse condemnation action bears no relation to the date of the taking. When an inverse condemnation action is filed, the condemning agency, by definition, has already taken the condemnee's property."[207] Use of the incorrect valuation date could hurt both parties. The state suffered in *Calmat* because the property was valued as of a later date during a time of rising real estate values, while Calmat suffered because it was deprived of back interest or back rent. "'These two wrongs do not make a right, or a fair trial.'"[208]

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204. 859 P.2d 1323 (Ariz. 1993).

205. Calmat of Arizona v. State *ex rel.* Miller, 836 P.2d 1010, 1018–19 (Ariz. Ct. App. 1992). Note that the trial court had ordered a new trial after concluding that its jury instructions were in error. The appeals court's decision reversed this order. *Id.*

206. *Calmat*, 859 P.2d at 1326.

207. *Id.* at 1327.

208. *Id.* at 1325 (quoting from the trial court's unpublished order granting the state's motion for a new trial).

The Arizona statute stated that interest runs from the date of the order granting possession to the state. However, in an inverse condemnation case there is no such order, and the state simply enters the property. The court found this to be another reason why the language of a direct condemnation statute is not directly transferable to inverse condemnation cases, concluding that the property should have been valued as of the date the government entered the property, with interest running from that date. *Id.* at 1328–29.

By holding that the date of entry, rather than the summons date, should be the Effective Moment in an inverse physical condemnation case, the Arizona court recognized the significant differences between direct and inverse condemnations. Unlike direct condemnation cases, which are governed by a statutory procedure, inverse condemnation cases are relatively unstructured, and the same rules often cannot be applied coherently. The Arizona courts apparently have not yet confronted the still more difficult question of how to identify the Effective Moment in an inverse regulatory takings case. Unlike *Calmat*, such a case does not present a physical entry on the premises that is easily observed, and the court must establish precisely when a regulation goes too far and effects a taking. In addition, such a case also may present the parallel question of when the regulatory taking ends, forcing the court to establish the Cessation Moment. The Arizona courts have gone further than most state and federal courts in addressing the difficult timing questions that arise in inverse condemnation cases, but likely will have to go further still when a landowner presents the proper facts.

The California courts have had several opportunities to pinpoint the Effective Moment in regulatory takings cases. In *People ex rel. Department of Transportation v. Gardella Square*,[209] the state filed an action in 1982 condemning property for a highway bypass. During the course of a 1984 settlement negotiation, the parties agreed that the state would deposit probable just compensation with the state treasury and that the property would be valued as of the date of this 1984 deposit.[210] The parties did not agree on a final compensation amount until 1986.[211] The trial court awarded interest running forward from the 1986 date on which the state took possession of the land, and the landowner appealed, seeking interest for the prior four-year period.[212]

Like the Arizona courts, the California Court of Appeal grasped that statutes and case law from direct condemnation cases are not always readily transferable to inverse condemnation settings,[213] a distinction that a less sophisticated court easily might miss. The court noted, for example, that:

> The right to interest in a condemnation proceeding arises from the judgment and, ordinarily, interest commences from that date.

209. 246 Cal. Rptr. 139 (Cal. Ct. App. 1988).

210. *Id.* at 141.

211. *Id.* at 142.

212. *Id.* at 140–42.

213. *Id.* at 144–47.

> However, where property is taken or damaged prior to judgment, the landowner's right to just compensation includes the right to have the award draw interest from the date of possession or the date the property was damaged.[214]

Since property can be taken by regulation before physical possession changes hands, the statute authorizing interest from the time "'the plaintiff takes possession of the property' must be read to include a 'constructive' taking of possession," and interest must run from that earlier date.[215]

This case is somewhat anomalous in that there may have been one Effective Moment for purposes of valuing the property and another for determining when interest started to run.[216] This aberration probably is explained by the parties' agreement that the property would be valued as of the date of the 1984 deposit of funds. The court would have been incorrect in choosing this intermediate date had the issue been left unresolved by the parties.[217] This anomaly also makes the opinion somewhat difficult to synthesize with other takings cases—its fact-specificity makes its definition of the Effective Moment non-transferable.

Five years later, a different district of the same court reached a similar result in *People ex rel. Department of Transportation v. Diversified*

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214. *Id.* at 145.

215. *Id.* at 147 (quoting Cal. Civ. Proc. Code § 1268.310(b) (West 1982)). The case was remanded on this point so that the landowners could prove that they were entitled to this amount. *Id.*

216. The property was valued as of 1984, but interest may have been due from 1982 through 1986. Thus, the state may have had to pay to the landowners, in 1986, the 1984 value of the property, with interest running perhaps from 1982.

217. If only a permanent taking resulted, whether in 1982 or in 1986, then the Effective Moment occurred at that point, the property should be valued as of that date, and interest should run from that point forward. *See supra* notes 96–97 and accompanying text. However, if a temporary taking occurred in 1982 followed by a permanent taking in 1986, then there are two components to the takings award. Temporary takings compensation should run from the 1982 Effective Moment through the 1986 Cessation Moment. The temporary value of the property—essentially, the rental value—would be calculated as of 1982, with interest running from the date on which payment was due. If the court were to treat this period as though it were a leasehold, then there could be multiple periodic rental payment dates, with interest accruing on each payment as of its own due date. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 21 (1949) (applying this approach).

In 1986, the temporary taking would cease and the permanent taking would begin. The Effective Moment of the permanent taking would occur at that point, the fee simple value of the property would be established as of that date, and interest on this second component of the award would run from that point forward. Under either analysis, the 1984 conference date is immaterial. *See supra* notes 93–95 and accompanying text.

Properties Co. III.[218] After deciding that it needed a portion of defendant's property for a highway interchange, the state moved slowly, made an inadequate purchase offer, and eventually advised the landowner that it could either accept the state's original offer or wait ten years until the state actually needed the property and would condemn it explicitly. The appellate court affirmed that an inverse taking had occurred with a 1986 Effective Moment,[219] but reversed the trial court's award of damages for precondemnation activities during 1987 and 1988, reasoning that the state could not owe the landowner money for damages to property that the landowner no longer owned.[220] Once again, a court identified an appropriate moment prior to physical occupation as the Effective Moment, concluded that the taking occurred then, calculated the value of the property as of that date, awarded interest on this amount running from that date, and suggested that the statute of limitations began to run at that point.[221] The court decided that the facts indicated a 1986 Effective Moment, and it used that Effective Moment in exactly the manner recommended in part II of this Article.

Both of these appellate court cases involved inverse takings that preceded physical occupations. More recently, the California Supreme Court decided a pure regulatory takings case, and although the landowner lost, portions of the court's opinion are relevant to the question of when the Effective Moment occurs. In *Hensler v. City of Glendale*,[222] the city adopted an ordinance prohibiting construction on major ridge lines within the city, and the landowner claimed that this change in the law precluded development on forty percent of his undeveloped 300-acre parcel.[223]

The city raised a statute of limitations defense, and the landowner responded that his claim was not time-barred because the ordinance worked an ongoing wrong and a new claim arose each day that the city failed to compensate him.[224] The court disagreed and found the

218. 17 Cal. Rptr. 2d 676 (Cal. Ct. App. 1993).

219. *Id.* at 680–82.

220. The court reasoned, correctly, that interest running from 1986 would compensate the landowner for the state's delay in paying for the taking and that any additional damage award would have provided the landowner with a double recovery for the 1987–88 period. *Id.* at 683–84 & 684 n.10 (citing People *ex rel.* Department of Transp. v. Gardella Square, 246 Cal. Rptr. 139, 144–48 (Cal. Ct. App. 1988)).

221. *Id.* at 684.

222. 876 P.2d 1043 (Cal. 1994), *cert. denied*, 115 S. Ct. 1176 (1995).

223. *Id.* at 1047.

224. *Id.* at 1056.

landowner's facial claim to be time-barred because he had failed to file it within the required 120 days after the statute became effective.[225] In dictum, the court noted that "if the challenge is to the *application* of the regulation to a specific piece of property, the statute of limitations for initiating a judicial challenge to the administrative action runs from the date of the final adjudicatory administrative decision. . . . [T]here is no uncertainty regarding the commencement of the period."[226] This dictum is in complete accord with the definition of the Effective Moment proposed in part II.

In arguing for the application of a longer statute of limitations, the landowner asserted that his predicament was analogous to that described in an earlier case, involving continuing noise, smoke, and vibrations from aircraft activity, in which the court had concluded that a much longer limitations period should apply.[227] The court here disagreed, distinguishing an ongoing nuisance from a one-time restriction on development. A land use regulation that works a taking, whether facially or as-applied, does so at a specific Effective Moment during the process and not on an ongoing basis.[228]

The courts of Florida also have had occasion to pinpoint the Effective Moment in inverse condemnation cases. In *County of Volusia v. Pickens*,[229] the county took the landowner's property in 1976, the landowner sued the county in inverse condemnation in 1978, and the remedy portion of the trial did not occur until 1981. The trial court instructed the jury to value the land as of 1981 and also to award imputed rent as compensation for lost income for the period from the 1976 taking through 1981, along with interest on the latter amount. The District Court of Appeal reversed as to both of these instructions, finding a permanent taking in 1976, ordering that the property be valued as of that date, and awarding interest running from 1976 through the date of the judgment.[230]

The trial court believed that the Effective Moment of a temporary taking occurred in 1976 and that the temporary taking ceased and was converted into a permanent taking in 1981. That court determined the value of the property for each separate taking as of its own Effective

225. *Id.* at 1056–61.

226. *Id.* at 1056–57 (emphasis added) (footnote omitted).

227. *Id.* at 1057 (citing Baker v. Burbank-Glendale-Pasadena Airport Auth., 705 P.2d 866 (Cal. 1985)).

228. *Id.* at 1056–58.

229. 439 So. 2d 276 (Fla. Dist. Ct. App. 1983).

230. *Id.* at 277–78.

Moment and awarded appropriate interest on the award for the earlier, temporary taking. The appeals court disagreed, found the taking to have been permanent from the outset, valued the property as of the one and only Effective Moment, and awarded interest from that point forward.[231] This Article previously has argued that each of these methods is entirely appropriate in given factual settings.[232] The appellate opinion offers fine descriptions of each of the two calculation methods, along with the court's explanation of why the facts merited the selection of one method over the other.[233]

The dispute in *City of Pompano Beach v. Yardarm Restaurant, Inc.*,[234] which began in 1973 and appears to have concluded in 1995, centered on the unsuccessful attempt of a property owner to replace a restaurant with a high-rise hotel and marina. After nearly two decades of negotiation and litigation, the trial court found that a taking had occurred on October 30, 1985, the date on which the owner's right to reinstate a building permit expired.[235] The appellate court reversed for several reasons, finding that any taking that might have occurred had its Effective Moment when the city denied the permit sometime prior to 1981 and its Cessation Moment when the permit was reissued in 1981.[236] As a result, the statute of limitations on any alleged temporary regulatory taking had expired before the landowner filed suit in 1987.[237]

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231. More generally, the court held that the date of the initial taking should be the Effective Moment of a permanent taking in all but the most exceptional cases. *Id.* at 277.

232. *See supra* notes 93–98 and accompanying text; *supra* note 217 and accompanying text.

233. An excellent dissent highlights some of the problems in pinpointing the Effective Moment that this Article already has noted. *See Pickens*, 439 So. 2d at 278 (Upchurch, J., dissenting). The dissenting judge notes, for example, that "inverse condemnation actions do not arise from a blatant seizure of a property. Normally, the invasion is more subtle." *Id.* at 279 *See supra* note 78 and accompanying text.

The dissent also mistakenly states that the court's approach is unfair to the landowner because "he will be paid in today's dollars for what the property was worth years ago." *Pickens*, 439 So. 2d at 280. This statement overlooks the fact that the landowner will receive interest on this amount from the earlier date. Thus the award is deficient only in the sense that it denies the owner the opportunity to gamble on the rate at which the property will appreciate.

234. 641 So. 2d 1377 (Fla. Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1197 (Fla.), *cert. denied*, 115 S. Ct. 2583 (1995). In reversing the trial court, the appellate court softened the blow to the landowner and the trial judge by observing accurately that "'takings' law is one of the most confused areas in American jurisprudence." *Id.* at 1384.

235. The permit had lapsed due to the owner's failure to continue the work. *Id.* at 1382.

236. *Id.* at 1388.

237. *Id.* at 1387–89. The court also noted other reasons why a taking had not occurred. First of all, by the time of the alleged taking, the appellee no longer was the landowner, as the property had been lost through foreclosure. Moreover, the fact that a city denies a permit to build an 18-story tower is not in and of itself a taking, as the city might have allowed less intensive development. *Id.* at 1384.

The appellate court criticized the trial court for its incorrect selection of 1985 as the Effective Moment, noting that the date the lower court chose "is not tied to any particular act on the part of Pompano Beach; rather, it appears to represent the date Yardarm decided to (or had to) 'give up.'"[238] The owner alleged that the city had kept raising barriers to the development and that the owner had won a succession of challenges to these barriers before deciding that it could not afford to proceed further. In response to the owner's argument that the Effective Moment occurs at the date on which it "quits struggling against the condemning authority's confiscatory regulation," the court stated that "[r]ipeness and persistence are not the same thing."[239] If the landowner elects to give up in frustration, the city will not be charged with a taking.[240]

The landowner also argued that the cumulative effect of all of the city's actions amounted to an ongoing taking, the last four years of which would not be barred by the statute of limitations.[241] The appellate court rejected this argument directly, stating that "there can be no 'domino effect' or 'piggybacking' of all the offenses of prior years so that previous, time-barred 'temporary takings' turn into a permanent taking whenever the regulatory authority takes any new action adverse to the developer and the developer decides he has had enough."[242] In short, any taking that might have taken place had occurred long ago, and any subsequent disappointment that the landowner had experienced did not rise to the level of a taking and did not resuscitate expired claims.

The Florida court's analysis largely conforms to the approach that this Article recommends. The court correctly distinguished between takings and due process claims[243] and correctly held that no taking had occurred within the limitations period.[244] It acknowledged that a series of temporary regulatory takings could occur, each with its own Effective and Cessation Moments, and recognized that each of these takings would be substantially free-standing.[245] The court wisely avoided creating a situation in which a landowner can trigger a taking by its own failure of

238. *Id.* at 1387.

239. *Id.*

240. The appellate court acknowledged that these facts might present a substantive due process violation but did not address this issue directly. *Id.* at 1385.

241. *Id.* at 1388.

242. *Id. See also* Hensler v. City of Glendale, 876 P.2d 1043, 1056–57 (Cal. 1994) (reaching the same conclusion), *cert. denied*, 115 S. Ct. 1176 (1995); *supra* notes 222–28 and accompanying text.

243. *Yardarm*, 641 So. 2d at 1384–85, 1388–89. *See supra* note 84 and accompanying text.

244. *Yardarm*, 641 So. 2d at 1385, 1388–89. *See supra* note 19 and accompanying text.

245. *Yardarm*, 641 So. 2d at 1388. *See supra* notes 101–03 and accompanying text.

will. Finally, the court declared accurately that while the parties' actions might incrementally bring about a taking, the court nonetheless must select a precise Effective Moment, the identification of which is critical for a variety of reasons.[246]

Several other state courts have had occasion to identify the Effective and Cessation Moments of an inverse condemnation. For the most part, their approaches correspond to the method advocated in part II of this Article. It is important to note, however, that few of these courts have focused much attention specifically on identifying the Effective and Cessation Moments. Moreover, most of these courts have faced only some of the many timing issues that may arise in temporary regulatory takings cases.

In one well-known takings case involving a regulatory taking, *Lucas v. South Carolina Coastal Council*,[247] the Supreme Court of South Carolina found that "Lucas has suffered a temporary taking deserving of compensation commencing with the enactment of the 1988 Act and continuing through the date of this Order."[248] The Wisconsin Supreme Court found the date on which a city council refused to issue a theater license to constitute the Effective Moment of a regulatory taking.[249] Similarly, the Michigan Court of Appeals defined the Effective Moment of a temporary regulatory taking as the date of a referendum vote that

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246. *Yardarm*, 641 So. 2d at 1388. *See supra* note 78 and accompanying text. In *State Dep't of Health v. The Mill*, the Colorado Supreme Court reached a similar result, holding that "[i]n both regulatory and physical takings, the taking 'occurs' at a certain point.... Although it may be difficult to determine when a regulatory taking commences (especially when regulations are gradually and continually applied), regulatory takings like physical takings commence at a certain point." 809 P.2d 434, 438–39 (Colo. 1991). This decision reversed a court of appeals opinion which had held that "where, as here, the regulatory restrictions are applied repeatedly and continually, the private injury and thus the 'taking' continues to 'occur' until such time as the regulations are removed or just compensation is paid." The Mill v. State Dep't of Health, 787 P.2d 176, 180 (Colo. Ct. App. 1989). *Accord* Robinson v. City of Seattle, 119 Wash. 2d 34, 88–90, 830 P.2d 318, 349 (rejecting the "continuing wrong" theory but acknowledging that some courts have reached the opposite result), *cert. denied*, 113 S. Ct. 676 (1992).

247. 424 S.E.2d 484 (S.C.), *on remand from* 112 S. Ct. 2886 (1992).

248. *Id.* at 486. Because the statute at issue originally contained no provision for variances or special exceptions, no administrative relief of any kind was available, and the Effective Moment occurred when the statute took effect. *Lucas*, 112 S. Ct. at 2889–92.

249. Maxey v. Redevelopment Auth., 288 N.W.2d 794, 805 (Wis. 1980). The court emphasized the distinction between direct and inverse condemnations:

> [I]n contrast to direct condemnation actions, where the commencement of the proceedings... may be fairly said to represent the date of taking, in an inverse condemnation, the date of taking, by definition, is required to antedate the commencement of the proceedings and is a jurisdictional prerequisite of the inverse condemnation action.

Id. at 804.

overturned the granting of a rezoning, and the Cessation Moment as the date the trial court entered an order to rezone the property.[250]

That same Michigan court focused on the Cessation Moment one year later, in a case involving a ban of indefinite duration on oil and gas drilling.[251] The trial court found that the state had permanently taken property by regulation and ordered the state to buy the property. The appeals court reversed in part, found the taking to be temporary and ongoing, ordered the state to pay compensation analogous to rent, and ordered further that the state pay interest on each periodic rental payment from the date it became due through the date it actually was paid. The latter analysis seems to be exactly correct in that it refuses to transform a temporary taking into a permanent one, just as *First English* proscribes, but awards just compensation, including interest, to the owner who has suffered a temporary taking.[252]

Cases involving physical takings are in accord. For example, in a case involving a physical invasion that predated the filing of a condemnation petition, the Supreme Court of Oregon held that the former date constituted the Effective Moment because that is the point at which "the landowner is . . . ousted from any further use of his property except the right to claim a reasonable value for its occupation."[253] As in regulatory takings cases, the court searched for the moment at which the government decisively altered the incidents of ownership.

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250. Poirier v. Grand Blanc Township, 481 N.W.2d 762 (Mich. Ct. App. 1992), *appeal denied*, 498 N.W.2d 737 (Mich. 1993). *See also* Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 18, 829 P.2d 765, 775 (noting that "[t]he City may therefore be liable to Sintra for a temporary taking. Damages would be measured from the time of the interference to the time the [offending ordinance] was no longer enforced."), *cert. denied*, 113 S. Ct. 676 (1992); Keystone Assoc. v. State, 433 N.Y.S.2d 695, 696, 700 n.7 (N.Y. Ct. Cl. 1980) (finding that a temporary taking began when a city official refused to issue a building permit and ended when the permit was issued eight months later, and awarding the landowner the fair rental value of the property for this eight-month period, plus interest).

251. Miller Bros. v. Department of Natural Resources, 513 N.W.2d 217 (Mich. Ct. App.), *appeal denied*, 527 N.W.2d 513 (Mich. 1994).

252. *See supra* notes 105–09 and accompanying text; *supra* notes 112–15 and accompanying text; *see also* Sheerr v. Township of Evesham, 445 A.2d 46, 74–75 (N.J. Super. Ct. Law Div. 1982) (employing a similar approach, but awarding the option value rather than the rental value).

253. State v. Stumbo, 352 P.2d 478, 483 (Or. 1960). The landowners wanted the court to fix the Effective Moment at the later date. This was because they had illegally subdivided the land into two-inch by two-inch squares, and conveyed 290 of these mini-lots by quitclaim deed in between these two dates, in an effort to increase the compensation that the state would owe.

See also Knox County v. Moncier, 455 S.W.2d 153, 156 (Tenn. 1970) (holding, in a case involving sporadic flooding, that "[o]nly when [an] injury is permanent in nature can there be a 'taking' within the contemplation of the statute; and until there is a 'taking' the statute of limitations does not begin to run").

IV. CONCLUSION

Establishing when the taking becomes effective and when it ends are two demanding but essential steps in a temporary regulatory takings case. Because the Supreme Court has decided that temporary regulatory takings merit compensation from the time they become effective, the Effective Moment, in addition to all its other functions, marks the point at which the compensation clock begins to run. And because the Court has determined that regulatory takings need not become permanent ones, the Cessation Moment, if there is one, establishes the point at which the obligation to compensate ends.

Even though identifying these two Moments is so critical, few courts ever have had to calculate compensation in a temporary regulatory takings case. Of the courts that have reached this stage, most either faced uncomplicated facts, relied on stipulations by the parties, made unsupported assumptions, or performed the calculation in a somewhat haphazard manner. The result is that landowners, regulators, judges, and scholars who search for precedent will find few cases to work with, and even fewer useful ones.

This Article has relied on the Supreme Court's hints and on the handful of thoughtful opinions from other courts in an attempt to establish when the Effective and Cessation Moments should be deemed to occur in temporary regulatory takings cases. The definitions proposed here are consistent with much of the existing case law from state and federal courts across the country. This synthesis should aid government officials, planners, and property owners who hope to determine the use of land, and the attorneys who advise them. In addition, the recommendations proposed in part II and tested in part III seek to clarify an area of takings law that has puzzled judges and scholars, and to provide a method for addressing the many related but undecided issues that are certain to arise in future regulatory takings cases.

The remedy portion of a temporary regulatory takings case is no less important—and, unfortunately, no more straightforward—than the liability phase. However, by the time a landowner prevails on the liability question, exhausted courts and frustrated parties may settle or just may become sloppy. As a result, useful discussions of compensation are not plentiful. Recent cases suggest that the courts are becoming more receptive to claims by property owners, and recent state and federal legislative activity may encourage more such claims in the future. The courts are certain to face hundreds of regulatory takings cases each year,

and as much as some judges and litigants may want to dodge the compensation issue, it is not going to go away.